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STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Cbeyond Communications, LLP, Global TelData II, LLC f/k/a Global TelData, Inc., Nuvox Communications of Illinois, Inc. and Talk America Inc. -vs- Illinois Bell Telephone Company Verified Complaint and Petition for an Order for Emergency Relief pursuant to 220 ILCS 5/13-515(e).	:	**05-0154**
XO Illinois, Inc. and Allegiance Telecom of Illinois, Inc. -vs- Illinois Bell Telephone Company Complaint pursuant to 220 ILCS 5/13-515.	:	**05-0156**
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ORDER

I. PROCEDURAL HISTORY

On March 7, 2005, Cbeyond Communications, LLP ("Cbeyond"), Global TelData, Inc. ("Global"), Nuvox Communications of Illinois, Inc. ("Nuvox"), and Talk America, Inc. ("Talk"), (collectively, "Joint Complainants"), filed their joint verified Complaint (in Docket 05-0154) against Illinois Bell Telephone Company ("SBC"), alleging that SBC is violating each of the following: its interconnection agreements ("ICAs") with each of the Joint

Complainants; its Illinois intrastate tariffs; Sections 13-514 and 13-801[1] of the Illinois Public Utilities Act ("PUA"); this Commission's Order in Docket 01-0614; the Federal Communications Commission's ("FCC's") SBC/Ameritech Merger Order[2] and Triennial Review Order on Remand ("TRRO")[3]. Joint Complainants contend that SBC committed the foregoing alleged violations by issuing certain documents, known as Accessible Letters ("ALs"), in which SBC announces policies and procedures under which it will interact, as an incumbent local exchange carrier ("ILEC"), with competitive local exchange carriers ("CLECs"), including Joint Complainants. On March 14, 2005, SBC filed an Answer and Contingent Counterclaim in response to the Complaint, denying the essential allegations against SBC (and seeking certain affirmative relief).

Also on March 7, 2005, XO Illinois, Inc. ("XO Illinois"), and Allegiance Telecom of Illinois, Inc. ("Allegiance") (collectively, "XO"), filed a joint verified Complaint (in Docket 05-0156) against SBC, alleging that SBC is violating each of the following: its ICAs with XO; Section 252 of the Federal Telecommunications Act of 1996[4] ("Federal Act"); Article IX and Section 13-514 of the PUA; and 47 C.F.R § 51.809(a). XO contends that SBC committed the foregoing alleged violations by issuing the Accessible Letters about which Joint Complaints also complain. Like Joint Complainants, XO is a CLEC. On March 14, 2005, SBC filed an Answer and Contingent Counterclaim in response to Joint Complainants' Complaint, denying the essential allegations against SBC (and seeking certain affirmative relief).

On March 14, 2005, McLeodUSA Telecommunications Services, Inc. ("McLeod"), also a CLEC, filed its verified Complaint (in Docket 05-0174) against SBC, alleging that SBC is violating the following: its ICA with McLeod; this Commission's Order in Docket 02-0230; Section 13-514 PUA; Section 252 of the Federal Act; the TRRO; and 47 C.F.R § 51.809(a). McLeod contends that SBC committed the foregoing alleged violations by issuing the Accessible Letters about which Joint Complaints and XO also complain. On March 21, 2005, SBC filed an Answer in response to Joint Complainants' Complaint, denying the essential allegations against SBC.

In each of the foregoing three Complaints, the complaining parties requested emergency relief from implementation of SBC's Accessible Letters. On March 9, 2005, the Administrative Law Judge ("ALJ") handling Dockets 05-154 and 05-0156 granted the following interim emergency relief in each proceeding:

> SBC is ordered to continue to offer the same UNEs as required by the parties' current ICAs until those ICAs are

[1] Respectively, 220 ILCS 5/13-515 and 13-801.
[2] Application of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules, CC Docket 98-141, Memorandum Opinion and Order, FCC 99-279 (1999).
[3] In the Matter of Unbundled Access to Network Elements / Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, FCC No. 04-290, WC Docket No. 04-0313, CC Docket No. 01-338 (Dec. 15, 2004, rel. Feb. 4, 2005).
[4] 47 USC 252.

> amended pursuant to Section 252 or as directed by the Commission in its final order in this proceeding.

On March 16, 2005, another ALJ granted the following interim emergency in Docket 05-0174:

> SBC is ordered to continue to offer the same unbundled local switching service as required by the parties' current ICAs until those ICAs are amended pursuant to Section 252 or as directed by the Commission in its final order in this proceeding.

Pursuant to the terms of Section 13-515(e) of the Act[5], the foregoing ALJ decisions became Orders of the Commission because it did not enter superseding Orders of its own. SBC then sought rehearing of those Orders. On March 23, 2005, the Commission issued Amendatory Orders in all three dockets. The following directive was added to each:

> [P]ursuant to [Section] 252 of the Federal Telecommunications Act, SBC is not required to provide new UNE-P[6] to customers who are not, as of March 11, 2005, part of the CLECs' customer base.

Additionally, the Commission further amended its Order in Docket 05-0174 by adding the specific interim emergency relief already awarded in Dockets 05-0154 and 05-0156 (quoted above). Consequently, the interim emergency relief in all three dockets is identical.

On March 17, 2005, the Commission Staff ("Staff") filed an Emergency Motion to Consolidate the three dockets. No party opposed that motion. On March 23, 2005, the Commission ordered that the three dockets be consolidated. With the agreement of all parties, the ALJ determined that the consolidated proceeding would be conducted on a schedule consistent with the statutory obligations associated with Docket 05-0174.

Pursuant to notice given in accordance with the law and the rules and regulations of the Commission, this matter was heard by an ALJ at the Commission's offices in Chicago, Illinois on March 18 and April 8, 2005. During the April 8 hearing, the ALJ concluded, upon recommendation by all parties, that no evidentiary hearing would be necessary in this case, provided that certain exhibits and stipulations were admitted to the record. Accordingly, the written testimony of the following persons was admitted without cross-examination or objection: (for Joint Complainants) Edward Cadieux of Nuvox, Julie Strow of Cbeyond, Francie McComb of Talk America and Mark Lieberman of Global TelData (for XO); Gladys G. Leeger; (for Mcleod) Julia A. Redman-Carter and Patrick J Herron; (for

[5] 220 ILCS 5/13-515(e).
[6] "UNE-P" is the acronym for "unbundled network element platform."

SBC) Carol Chapman. Additionally, motions for administrative notice by Joint Complainants and by McLeod were granted by the ALJ.

On April 25, 2005, the evidentiary record in the consolidated proceedings was marked “heard and taken.”

Joint CLECs, XO, McLeod, SBC and Staff have each filed an Initial Brief (“Init. Br.”) and a Reply Brief (“Rep. Br.”) addressing the issues here.

An ALJ’s written Decision was issued and served upon all parties on May 9, 2005. On May 16, 2005. SBC, McLeod, Joint CLECs and Staff each filed a Petition for Review (“Pet. Rev.”) of the ALJ’s Decision. On May 18, 2005, each party filed a Response (“Resp. Pet. Rev.”) to certain review petitions filed by other parties. Pursuant to subsection 13-515(d)(8) of the PUA, the Commission hereby issues this Order on review, which largely incorporates, but also modifies, the ALJ’s Decision.

II. JURISDICTION

Joint Complainants, XO and McLeod each invoke the Commission’s jurisdiction under Sections 13-514 and 13-515 of the PUA. XO and McLeod also invoke Section 13-516, and Joint Complainants also invoke 13-801 of the PUA and subsection 251(d)(3) of the Federal Act. SBC characterizes some of complainants’ jurisdictional assertions as “legal conclusions” with which it “does not agree.” However, it admits XO’s assertions (which are also made by McLeod) “to the extent they are consistent with the statutes referenced therein.”

The Commission finds that Section 13-515 of the PUA provides our jurisdiction to entertain complaints concerning purported violations of Section 13-514, and to impose the remedies set forth in Section 13-516. We also find that subsection 13-801(k) authorizes us to entertain complaints for violation of Section 13-801 through the procedures in Section 13-515. Subsection 251(d)(3) of the Federal Act does not, on its face, confer jurisdiction upon this Commission. Rather, it precludes federal preemption of state enforcement actions under the circumstances described in the subsection.

III. THE NATURE OF THE DISPUTE

This is a dispute among business adversaries in the context of regulated competition. One competitor, the ILEC, has been required by state and federal regulators (acting under legislative mandates) to provide the CLECs with access to (and use of) its own facilities and systems, which those competitors then use to serve customers obtained in competition with SBC and with each other. This arrangement has been predicated on the entwined rationales that competition would produce public benefit, that the ILEC’s facilities and systems were already connected to customers, that such facilities and systems arose from (and were funded by) an historic and government-authorized monopoly, and that those facilities and systems were necessary inputs (whether financially or technologically) for the CLECs' competitive offerings. This has been a dynamic arrangement, as technology, market behavior and regulatory requirements have been in transformation since the inception of authorized competition.

The FCC's TRRO is the most recent transformative regulatory pronouncement. It alters existing requirements concerning three categories of the unbundled network elements ("UNEs") that CLECs obtain from ILECs in order to serve CLEC customers - "mass market" unbundled local switching ("ULS")[7], DS1 or DS3 local loops in ILEC wire centers meeting specified criteria (and all dark fiber loops), and unbundled, dedicated, DS1, DS3 and dark fiber interoffice transport on certain routes between ILEC wire centers. In each instance, the ILECs were relieved of federal Section 251 obligations previously required by regulators and still included in their ICAs with CLECs. However, questions about the extent, timing and procedural prerequisites for such relief, and about the viability of state and other federal requirements, have occasioned a flurry of litigation.

Based on its view that the new TRRO requirements take immediate effect, prior to bilateral negotiations with CLECs, SBC initiated unilateral implementation by issuing the ALs mentioned above (AL-17 through AL-20[8]). The complaining CLECs lodged objection to the ALs; SBC rejected those objections, which led to the instant proceeding. In pertinent part, AL-17 addresses SBC's provision of ULS/UNE-P:

> Accordingly, as of the effective date of the TRO Remand Order, i.e., March 11, 2005, CLECs are no longer authorized to place, nor will SBC accept, New (including new lines being added to existing Mass Market Unbundled Local Switching/UNE-P accounts), Migration or Move LSRs for Mass Market Local Switching/UNE-P. Any New, Migration or Move LSRs placed for Mass Market Unbundled Local Switching/UNE-P after March 11, 2005 will be rejected. The effect of the TRO Remand Order on New, Migration or Move LSRs for Mass Market Unbundled Local Switching/UNE-P is operative notwithstanding interconnection agreements or applicable tariffs.[9]

AL-18 also addresses SBC's provision of ULS/UNE-P and includes the following:

> As explained in [AL-17] as of the effective date of the TRO Remand Order, i.e., March 11, 2005, you are no longer authorized to send, and SBC will no longer accept, New (including new lines being added to existing Mass Market

[7] "Mass Market" ULS serves end user customers using DS0 capacity loops.
[8] CLECALL05-017 ("AL-17"), CLECALL05-018 ("AL-18"), CLECALL05-019 ("AL-19"), and CLECALL05-020 ("AL-20").
[9] "LSR" is the abbreviation for local service request.

> Unbundled Local Switching/UNE-P accounts), Migration or Move LSRs for Mass Market Unbundled Local Switching/UNE-P. Any New, Migration or Move LSRs placed for Mass Market Unbundled Local Switching/UNE-P on or after the effective date of the TRO Remand Order will be rejected.

AL-19 concerns SBC's loop and transport offerings, and includes the following:

> …As set forth in the TRO Remand Order, specifically in Rule 51.319(a)(6), as of March 11, 2005, CLECs "may not obtain," and SBC and other ILECs are not required to provide access to Dark Fiber Loops on an unbundled basis to requesting telecommunications carriers. The TRO Remand Order also finds, specifically in Rules 51.319(a)(4), (a)(5) and 51.319(e), that, as of March 11, 2005, CLECs "may not obtain," and SBC and other ILECs are not required to provide access to DS1/DS3 Loops or Transport or Dark Fiber Transport on an unbundled basis to requesting telecommunications carriers under certain circumstances. Therefore, as of March 11, 2005, in accordance with the TRO Remand Order, CLECs may not place, and SBC will no longer provision New, Migration or Move Local Service requests (LSRs) for affected elements.

AL-20 also concerns SBC's loop and transport offerings, and includes the following:

> As explained in CLECALL05-019, as of the effective date of the TRO Remand Order, i.e., March 11, 2005, you are no longer authorized to send, and SBC will no longer accept, New, Migration or Move LSRs for unbundled high-capacity loops or transport, as is more specifically set forth in that Accessible Letter, and such orders will be rejected.

After the ALJ granted emergency relief to XO and Joint Complainants, SBC issued AL-39[10], prescribing procedures by which CLECs could obtain high capacity loops and dedicated transport through self-certification, irrespective of the prohibitions contained in AL-18 and AL-20. In SBC's view, AL-39 implements the requirements of ¶234 of the TRRO.

SBC attached "TRO Remand Amendments" to AL-18 (ULS/UNE-P) and AL-20 (loops and transport) that SBC contends will, upon CLEC signature, immediately constitute the requisite revision to a complaining CLEC's ICA with SBC. SBC apparently views its proposed amendments as mechanisms for satisfying the FCC's

[10] CLECALL05-039.

requirement that ICAs be revised to reflect the TRRO, not as preconditions to implementation of the TRRO on March 11, 2005.

Accordingly, SBC's position is that its ALs, taken together, accurately characterize the regulatory changes announced in the TRRO, that unilateral implementation is permissible (indeed, expected) under the TRRO, that such implementation may take effect on March 11, 2005, whether or not SBC's ICAs with the CLECs have been revised, and that nothing else in federal or state law precludes such implementation on SBC's terms. (SBC acknowledges that ICA revision must occur, but that the provisions in the ALs can take effect before such revisions are completed.[11]) The position of the complaining CLECs is that SBC misconstrues what the TRRO requires substantively (particularly with respect to the definition of a CLEC's embedded customer base), that implementation of all of the TRRO's regulatory changes must occur through - and cannot occur until completion of - the change-of-law processes in the parties' ICAs, and that implementation cannot disregard the imperatives of state and federal laws and FCC orders.

IV. ANALYSIS AND CONCLUSIONS

A. ULS/UNE-P

In the TRRO, the FCC declared that it would "impose no section 251 unbundling requirement for mass market switching nationwide."[12] Because the FCC also found that CLECs utilize ULS "exclusively in combination with [ILEC] loops and shared transport in an arrangement known as…UNE-P,"[13] the TRRO rulings concerning ULS also determine the availability of UNE-P under Section 251[14].

Nonetheless, the FCC ordered the ILECs to continue providing ULS/UNE-P for the CLECs' embedded base of end-user customers during a 12-month transition period following the effective date of the TRRO[15]. There is no dispute that these directives were embodied in FCC Rule 51.319(d)(2), which became effective on March 11, 2005, as directed by the FCC in ¶235 of the TRRO. It is also undisputed that the TRRO itself took effect on that date.

SBC's essential stance in this proceeding is that, in view of the FCC's non-impairment determination under Section 251, the provision of ULS/UNE-P after the effective date of the TRRO (and its associated rules) would be unlawful. But if that position were correct, the FCC would lack the authority to establish a transition period at

[11] SBC also avers that some of the complaining CLECs' ICAs automatically incorporate regulatory changes, without negotiation.
[12] TRRO ¶199.
[13] *Id.*, fn. 526.
[14] "To the extent that unbundling of shared transport…[was] contingent upon the unbundling of local circuit switching in the [TRO], the availability of [that] element[] on an unbundled basis continue[s] to rise or fall with the availability of [ULS]." *Id*, ¶200, fn. 529.
[15] *Id.*, ¶227.

all[16]. SBC does not attack the transition period before this Commission, however. Instead, it seeks to implement its view of the transition, to preclude the CLECs from obtaining UNE-P for use beyond their embedded customer bases after March 11, 2005. Accordingly, the issue presented here does not concern whether the FCC can require an ILEC to continue providing UNEs after an FCC nonimpairment declaration. Rather, it concerns the FCC's intent regarding the timing of such provisioning[17] and the customers who can be served by the relevant UNEs during the transition period.

What, then, did the FCC intend for the transition period mandated by the TRRO? More specifically, did the FCC intend that the TRRO's substantive directives concerning ULS/UNE-P (and loops and transport) be implemented by the ILECs on March 11, 2005, prior to revision of the parties' ICAs? And if the FCC intended implementation before completion of the ICA amendment process, did it authorize unilateral determination of the terms of implementation by an ILEC?

1. Must Bilateral ICA Amendment Precede TRRO Implementation?

In the TRRO, the FCC states that the transition period "shall apply only to the embedded customer base, and does not permit [CLECs] to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to section 251(c)(3) except as otherwise specified in this Order."[18] Putting aside, for the moment, the exception clause in the quoted text (i.e., the final clause in the sentence), the FCC is plainly declaring that UNE-P is now unavailable outside of the CLECs' embedded customer bases. There is no transition for what might be called "non-customers."

The question therefore becomes whether there is anything "otherwise specified in this [TRRO]" that would permit CLECs to obtain ULS/UNE-P for customers beyond the embedded base after March 11. In the footnote to the exception clause, the FCC specifies that a requesting CLEC "shall continue to have access to shared transport, signaling, and the call-related data bases as provided in the [TRO] for those arrangements relying on [ULS] that have not yet been converted to alternative arrangements."[19] Do the "arrangements" that "have not yet been converted to alternative arrangements" include "arrangements" for all customers, or only for customers within the embedded base? This Order concludes that what is "otherwise specified" in the TRRO is that *embedded* customers can be served by "new UNE-P arrangements" during the transition, until "alternative arrangements" have been made

[16] The FCC also established a post-nonimpairment transition period in the TRO. TRO, ¶532 ("By five months *after a finding of no impairment*, [CLECs] may no longer request access to [ULS]" (emphasis added).) The FCC expressly defended the legality of this post-nonimpairment mechanism. *Id*., fn. 1630 ("We disagree with Chairman Powell's claim that permitting [CLECs] to transition their mass market customers off of unbundled switching over the course of a three-year period is either unreasonable or unlawful…Chairman Powell concedes that the Commission has the discretion to set forth reasonable transition periods….").
[17] "The only real dispute is one of timing, i.e., how soon may [an] ILEC stop providing new UNEs?" SBC Init. Br. at 3.
[18] TRRO ¶227.
[19] *Id*., fn. 627.

for *those* customers. There is nothing "otherwise specified" in the TRRO that authorizes "new UNE-P arrangements" for non-embedded customers.

Stating the CLECs' remaining entitlement during the transition period more affirmatively, the ILECs must provide, under the terms of a pre-transition ICA, ULS/UNE-P for the use of a customer served by the CLEC before the transition period began (i.e., the embedded base). However, customers properly identified as new customers are not included in this universe. They are not part of the embedded base for whom the transition period was designed by the FCC. Thus, there is no need for pre-implementation negotiation on this point. The FCC has already determined that embedded customers are entitled to ULS/UNE-P during transition, and non-customers are not.

Nevertheless, the fact that the embedded/non-embedded customer dichotomy is beyond negotiation does not mean that negotiation is unnecessary to the implementation of that dichotomy. Having mandated different post-impairment treatment for embedded and non-embedded customers, the FCC left open the practical task of distinguishing one group from the other. The embedded customer base is not self-defining. Indeed, SBC and the complaining CLECs do not even agree with respect to whether the embedded base pertains to customers or to the particular ULS/UNE-P arrangements used by those customers as of March 11.

Assuming here that the embedded base is defined by customers rather than lines (as this Order concludes below), several practical implementation issues require consideration in order to effectuate the FCC's intention to treat new and embedded customers differently. Moreover, there are implementation issues affecting different stages of the transition period, because the carriers will need to identify *both* the customers that are in the embedded base on March 11 and the embedded customers who will be deemed to have subsequently lost their embedded status during the transition.

By way of example, and without purporting to be comprehensive, this Order identifies the following issues. Regarding the status of customers at the beginning of the transition, if SBC were processing an order for a new CLEC customer on or before March 11, 2005, would that customer be in the embedded base? Would it matter if the customer's order had been placed with the CLEC before that date, but not presented to SBC until afterward? If a timely order has been rejected by SBC, but resubmitted after March 11, must SBC process that order? Does it matter if the cause of rejection was an SBC error?

With respect to customers embedded on March 11, can the identity of a business customer be sufficiently altered to constitute a new customer? Would a business customer retain its embedded status if it subsequently moves to a nearby location, merges with another entity or is spun off? Would a residential customer remain in the embedded base after changing her/his residence? Would it matter if s/he retains her/his phone number? When a residential customer adds a new service line, is that part of embedded base? What is the status of an embedded customer who restores service after a cutoff during the transition? Importantly, these questions affect customer expectations – about which the TRRO expresses considerable concern[20] - as much as they do the revenues of the carriers here.

The FCC, in the TRRO, did not supply express criteria for answering the foregoing questions in particular, or for otherwise separating new and embedded customers generally. Consequently, the reasonable conclusion is that the FCC intended that the identification of new and embedded customers would be managed by the state Commissions as part of TRRO implementation at the state level. The FCC evinces a clear preference in the TRRO for inter-carrier negotiations[21], with state Commission oversight[22], during which the ILEC will be assured of the increased prices established by the TRRO. Nothing in the TRRO suggests that SBC (or, for that matter, a CLEC) can unilaterally determine whether embedded base is comprised of customers or lines or, assuming it is comprised of customers, how to distinguish embedded from new customers[23]. Therefore, SBC and the complaining CLECs must negotiate the terms, conditions and processes by which embedded customers will be identified and by which their embedded status is forfeited.

Such negotiations should be confined to establishing the bases for distinguishing embedded and non-embedded customers. They should commence immediately and need not be conducted with, or on the same schedule as, the broader TRRO-mandated negotiations to amend the parties' ICAs[24]. Instead, such negotiations must be completed within 28 days of the entry of this Order[25]. To be entirely clear, these 28-day negotiations should only determine *who* is an embedded customer, while the broader ICA amendment negotiations will determine *how* embedded customers will be served during the transition. The results of the 28-day negotiation should become operative upon agreement, and should later be incorporated in the parties' ICA amendments (unless they have been rendered obsolete by the completion of the transition period). This two-step process will carry out the FCC's two-pronged intention to promptly freeze ULS/UNE-P while assuring continuity of service to embedded customers as they make substitute telecommunications arrangements.

[20] "In particular, eliminating unbundled access to [ILEC] switching on a flash cut basis could substantially disrupt service to millions of mass market customers, as well as the business plans of competitors [footnote omitted]." TRRO ¶226.
[21] "Thus, the [ILEC] and [CLEC] must negotiate in good faith regarding any rates, terms and conditions necessary to implement our rules changes [footnote omitted]." TRRO ¶233.
[22] "We encourage the state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay." *Id.*
[23] Moreover, even if SBC were empowered to decide the customers-versus-UNEs issue unilaterally, its unilateral interpretation has been rejected by the overwhelming majority of commissions considering that question, as will be discussed in greater detail below.
[24] SBC purports to believe that the 28-day negotiation *precedes* the broader ICA amendment negotiations. SBC Pet. Rev. at 27. That is incorrect. While the 28-day negotiation must commence immediately - to protect *SBC's* interests - the broader negotiations can, also. The complaining CLECs have already requested such negotiations.
[25] Insofar as the parties in this proceeding are also parties to Docket 04-0606, they can, but are not required to, use the collaborative sessions in the latter case to conduct their negotiations.

The Commission notes that the California Public Utilities Commission, on which SBC places considerable reliance[26], similarly precluded SBC from rejecting UNE-P orders until negotiations were conducted with CLECs[27]. The California PUC did this even though it contradicted our holding that a CLEC's embedded customer base consists of the CLEC's *customers* as of March 11, rather than the UNE-P arrangements serving those customers as of that date. The California commission's view was that applicable law immediately relieved SBC of any new UNE-P obligation for embedded customers. Nonetheless, the California PUC held that SBC could not deny new UNE-P to those customers *until a short negotiation period (approximately 50 days) was completed*[28]. Thus, our order here to briefly negotiate, in order to establish ground rules for this important transition, is hardly unprecedented. Like our California counterparts, this Commission concludes that the relief from a legal obligation (here, unbundling) is not necessarily implemented immediately, unilaterally or without regard to the remaining duties and rights of the parties (particularly when, as here, the former obligor's interests are protected by a mandatory rate increase and true-up).

Once the guidelines and processes for separating embedded and non-embedded customers are in place, SBC will be free to deny ULS/UNE-P for service to properly identified non-embedded customers, irrespective of the status of broader negotiations conducted on a Section 252 track, consistent with TRRO directives. The broader negotiations will remove SBC's Section 251 unbundling duties per the TRRO, establish the terms governing ULS/UNE-P procurement and maintenance for embedded customers during the transition, and, where needed, determine prices for UNEs provided under Section 271 of the Federal Act and Section 13-801 of the PUA.

It is certainly conceivable that, pending completion of the foregoing negotiations, some number of non-embedded customers will receive ULS/UNE-P to which they are not entitled under Section 251. However, SBC has already assumed that risk, having pledged to continue filling the CLECs' UNE-P requests until certain state law issues (discussed below) have been resolved. And more to the point, this Order does *not* authorize the CLECs to obtain ULS/UNE-P for non-embedded customers. To the contrary, the Commission unambiguously declares that only embedded customers can be served via those UNEs during the transition. Accordingly, a CLEC is prohibited from requesting such UNEs to serve any customer it believes to be non-embedded (for example, a customer that had neither received nor applied for that CLEC's services before March 11, 2005). There is nothing in the record suggesting that any party here will ignore this limitation. And if a non-embedded customer does temporarily obtain service through ULS/UNE-P, the involved CLEC will pay (when initially billed or through true-up) the increased ULS/UNE-P rates imposed by the TRRO.

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[26] *E.g.*, SBC Pet. Rev. at 35-36.
[27] Petition of Verizon California Inc., Assigned Commissioner's Ruling Granting in Part Motion for Emergency Order Granting Status Quo for UNE-P Orders, ,App. No. 04-03-014, Cal. PUC Mar. 11, 2005.
[28] *Id.* ("SBC is directed to continue processing CLEC orders involving additional UNE-Ps for the embedded base of customers who already have UNE-Ps, until no later than May 1, 2005").

In sum, the complaining CLECs are prohibited from serving non-embedded customers through Section 251 ULS/UNE-P as of March 11, 2005. However, guidelines are needed to identify such customers, and to protect the transition entitlement of embedded customers[29]. Such guidelines must be established through bilateral processes on the schedule prescribed above. After those guidelines are established – but not before - SBC can deny any request for Section 251 ULS/UNE-P to serve a non-embedded customer. Each complaining CLEC is immediately prohibited from requesting Section 251 ULS/UNE-P for customers it believes to be non-embedded. SBC is prohibited from denying any CLEC new, add, drop, migrate or move request for an embedded ULS/UNE-P customer. Any ULS/UNE-P provided to a CLEC after March 11, 2005 is subject to the rate increase established in the TRRO. To the extent that SBC's ALs are inconsistent with these conclusions, they cannot be enforced.

2. Improper Unilateral Implementation of the TRRO

In the TRRO, the FCC plainly stated that its order should be implemented through bilateral negotiations.

> We expect that [ILECs] and competing carriers will implement the Commission's findings as directed by section 252 of the Act. Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order. We note that the failure of an [ILEC] or a [CLEC] to negotiate in good faith under section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action. Thus, the [ILEC] and [CLEC] *must negotiate in good faith regarding any rates, terms and conditions necessary to implement our rule changes*.[30]

SBC has fallen short of the FCC's negotiation requirement in several instances.

First, the FCC contemplates a true-up for ULS/UNE-P provided during the transition period. "UNE-P arrangements no longer subject to unbundling shall be subject to true-up to the applicable transition rate *upon the amendment of the relevant interconnection agreements*, including any applicable change of law processes."[31]

[29] SBC asserts that there would be no necessity for such guidelines if its preferred view of the embedded customer base (i.e., UNEs, not customers) were adopted. "The definition of a pre-existing UNE is easy and requires no negotiation. Either the CLEC has that UNE at that location or it does not." SBC Pet. Rev. at 29. The shortcomings of that assertion are demonstrated by SBC's very presentation of it. SBC predetermines that an embedded UNE must be "at that location," but nothing in the TRRO expressly precludes moving "that UNE" to another location. And what is "that location?" Is it an office within a building, or the entire building or connected buildings under single ownership? What is the location for already-leased dark fiber loops? Does activating and assigning dark fiber make it a new UNE? If "that UNE" remains at "that location," must it still be unbundled for new corporate ownership of the end-user premises? Or for a new responsible party at a residence, even if the previous responsible party remains in the residence? The inescapable fact is that ambiguities arise irrespective of whether embedded customer base consists of customers or UNEs. That is why an expedited negotiation must precede denial of UNEs.

[30] TRRO ¶233 (footnotes omitted) (emphasis added).

[31] *Id.*, ¶228, fn. 630 (emphasis added).

Thus, the FCC expects the ILECs to continue to provide some "arrangements" at something other than the transition rate *until ICAs are amended* (at which time the transition rate would be retroactively applied).

In AL-18, SBC explicitly contravenes the FCC's TRRO directive that true-ups follow - rather than precede - completion of the ICA revision process. AL-18 states that "to ensure accurate billing based on current lines in service each month, the most effective mechanism to facilitate the rate modification is to apply it beginning March 11, 2005, and eliminate the need for manual true-ups *at the end of the transition period*."[32] Approximately two months after issuing AL-18, SBC stated, in testimony filed in this proceeding, that it would not actually require the CLECs to pay the higher rates that SBC had unilaterally determined to bill before ICA amendments were approved[33]. That nonbinding statement does not appear anywhere in the ALs that are the subject of the instant complaints, however.

As the FCC explained, during the transition period the TRRO-mandated UNE price increases "provide some protection of the interests of the [ILECs] in those situations where unbundling is not required."[34] Though that protection is applied to the entire 12-month transition, it is accomplished retroactively through true-up. That scheme constitutes the FCC's balancing of the carriers' interests and precludes additional self-help by the carriers, outside of "applicable change of law processes."[35]

The efficacy of SBC's billing scheme (and, when viewed superficially and without CLEC input, it does appear to have practical merit) is beside the point. The course of events has been determined by the FCC, and even if that course can be altered, that must be done by mutual agreement of the parties. Consequently, billing for ULS/UNE-P must conform to existing ICA rates and terms, until the ICAs are amended or, at a minimum, the parties can agree otherwise.

Second, the TRRO prescribes a self-certification process by which a CLEC can obtain unbundled loops and transport[36] (UNEs that will be discussed more substantively later in this Order) during the TRRO transition period. Nothing in SBC's February 11, 2005 ALs (ALs 17-20) acknowledged or implemented this requirement. After XO and

[32] AL-18, p. 2 (emphasis added)[32].
[33] SBC Ex. 1.0 at 19
[34] TRRO ¶228.
[35] To be sure, SBC does state that it "will not require CLECs to pay the difference between the rates currently in the ICA and the new rates (or engage in collection activity on this difference) until the CLEC'S [ICA] has been amended." SBC Ex. 1.0 at 19. Nevertheless, this caveat does not appear in an AL, it is not legally binding upon SBC, it is contrary to the language of the TRRO and it was unilaterally imposed, without negotiation.
[36] "Upon receiving a request for access to a dedicated transport or high-capacity loop UNE that indicates that the UNE meets the relevant factual criteria discussed in sections V and VI above, the incumbent LEC must immediately process the request. To the extent that an incumbent LEC seeks to challenge any such UNEs, it subsequently can raise that issue through the dispute resolution procedures provided for in its interconnection agreements. In other words, the incumbent LEC must provision the UNE and subsequently bring any dispute regarding access to that UNE before a state commission or other appropriate authority." TRRO ¶234.

Joint Complainants received emergency relief, however, SBC issued AL-39, to unilaterally implement CLEC self-certification. AL-39 included a request form[37] and directs the requesting CLEC to include "the factual or other basis for its belief" that impairment is extant at a wire center. The TRRO does not require such an explanation. Again, the efficacy of SBC's implementation mechanism is beside the point. What is germane at this stage is that SBC initially ignored self-certification, then unilaterally imposed terms for its implementation[38].

Third, in AL-39, SBC announced that it had filed with the FCC a list of the wire centers that SBC believes satisfy the FCC's non-impairment criteria. SBC advised the CLECs that they could review certain underlying data by contacting a named SBC attorney[39]. McLeod contends that SBC has "listed certain wire centers and routes as not meeting the new impairment criteria which McLeodUSA's analysis, using data from a third-party data source, indicated do meet the TRRO impairment criteria."[40] Whether McLeod is correct is not important here. What matters is that SBC unilaterally determined which wire centers were free of impairment, in derogation of the TRRO directive that the parties negotiate implementation of the FCC's rules changes.

Fourth, as already noted, SBC's opinion is that a CLEC's embedded base is comprised of the UNE arrangements serving customers on March 11, 2005, rather than the customers served by those arrangements. The complaining CLECs disagree. That dispute has been addressed in several jurisdictions, by state commissions and courts (and is addressed in the next subsection of this Order). Nevertheless, SBC unilaterally decides that dispute in ALs 17-20, in which it declares that it will not fulfill "New, Migration or Move" requests. SBC affronted the TRRO by disposing of that issue unilaterally.

To the extent that SBC's ALs purport to authorize any of the foregoing unilateral actions, they cannot be implemented or enforced.

3. Embedded Base: Lines or Customers?

The parties agree that a CLEC's "embedded customer base" is entitled to participation in the transition period during which ULS/UNE-P (and unbundled dedicated transport and high capacity loops) will be phased out. The parties dispute whether the TRRO's embedded customer base consists of CLEC customers, as of March 11, 2005, or the particular UNEs employed to serve those customers on that date. The key

[37] The FCC had suggested, but not required, a letter to the ILEC from the CLEC. *Id.*, fn. 658.
[38] SBC erroneously perceives this language as "asserting that the self-certification procedures for high capacity loops and transport are not effective without a contract amendment." SBC Pet. Rev. at 38. To the contrary, the Commission concludes that SBC should have implemented the TRRO's self-certification mechanism immediately (and certainly prior to our emergency relief), but without unilaterally expanding upon the text of ¶234 of the TRRO. It was that expansion that required negotiation.
[39] The Joint CLECs allege that they have yet to be given access to SBC's data. Joint CLEC Rep. Br. at 18, fn. 9.
[40] McLeod Init. Br. at 19.

sentence in the TRRO does not, on its face, rule out either interpretation[41]. On the one hand, the FCC reference to the "customer" base supports the CLECs' construction. If the FCC had meant to limit the transition to extant UNEs, it could have said so. On the other hand, the prohibition against new UNE-P "arrangements" buttresses SBC's position, because it focuses on facilities, not customers.

The better resolution of this issue is derived from the essential purpose of the transition period – to avert substantial service disruption for "millions of mass market customers, as well as the business plans of [CLECs]."[42] The FCC surely understood that an embedded customer's circumstances could change long before the serving CLEC had completed its phase-out of ULS/UNE-P. That is, the customer's need to move, add or drop a facility or feature is independent of, and not on the same timetable as, the CLEC's transition arrangements. The former are determined by the customer's personal or business activities, while the latter are dependent upon the CLEC's progress with, *inter alia*, "deploying competitive infrastructure, negotiating alternative access arrangements, and performing loop cut overs or other conversions."[43] If the serving CLEC cannot meet customers' changing needs during the transition, those customers will have to choose between doing without service modifications or changing carriers. The first choice would likely diminish service quality, while the second may be adverse to the customer, particularly if the choice was triggered by an emergency. Moreover, market dynamics would also be adversely affected. Precluding CLECs from answering the needs of their existing customers during the transition would hardly be competitive neutral.

The CLECs here correctly emphasize that a substantial majority of state commissions has adopted the CLEC position that the embedded base consists of customers rather than facilities.[44] The Indiana Utility Regulatory Commission stated:

> We think the TRRO is clear in its intent that a CLEC's embedded base (its UNE-P customer, and those customers for which UNE-P has been requested, as of March 11, 2005) not be disrupted. We would expect an embedded base customer to be able to acquire or remove any feature associated with circuit switching during the transition period.[45]

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[41] "This transition period shall apply only to the embedded customer base, and does not permit [CLECs] to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to section 251(c)(3) except as otherwise specified in this Order." TRRO ¶227.

[42] *Id.*, 226.

[43] *Id.*, 227. The FCC noted comments asserting that these processes could also require CLECs to generate needed capital, partner with other CLECs or exit particular markets. *Id.*, fn. 629.

[44] *E.g.*, XO Rep. Br. at 6 *et seq*.

[45] Complaint of Indiana Bell Tel. Co., Cause No. 42749, Order, Indiana URC., Mar. 9, 2005, at 8. The IURC reaffirmed this view in a subsequent Order in the same docket. Order, April 6, 2005, at 2 ("the TRRO is consistent in establishing transition periods running from the effective date of the TRRO so that the embedded customer base (*existing customers*) can be moved in an orderly fashion to alternative arrangements") (emphasis added). SBC's claim to the contrary, based on general language elsewhere in the IURC Order, is disingenuous.

The Michigan Public Service Commission also adopted this position:

> The distinction between the embedded base of *lines* versus the embedded base of end-user *customers* is critical and recognizes that the needs during the transition period of an existing CLEC customer may go well beyond the level of service provided as of March 11, 2005. By focusing on the needs of the embedded base of end-user customers rather than on lines, the FCC has ensured that the transition period will not serve as a means for an ILEC to frustrate a CLEC's end-user customers by denying the CLEC's efforts to keep its customers satisfied.[46]

Other state commissions reaching the same conclusion include Kansas[47] and Texas[48]. However, as noted above, SBC accurately demonstrates that the California commission adopted a contrary position[49].

To be sure, the FCC plainly intends to discontinue the availability of ULS/UNE-P under Section 251 of the Federal Act. The provision of additional ULS and related services to embedded CLEC customers during the transition can appear, superficially, to inhibit realization of that objective. However, it is just as plain that the FCC also intends to minimize customer disruption and promote competition. Both of those objectives are achieved by an orderly phase-out – which, in turn, necessitates enabling the CLECs to meet their current customers' needs until alternative arrangements are in place. Indeed, the FCC expressly elected to *lengthen* the phase-out[50], to assure that CLECs and CLEC customers could maintain such continuity. Moreover, upholding CLEC service quality during the transition will not harm SBC. The CLECs will pay an approved price for whatever they buy, informed CLEC embedded customers will not

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46 In the matter, on the Commission's own motion, to commence a collaborative proceeding to monitor and facilitate implementation of Accessible Letters issued by SBC Michigan and Verizon, Case No. U-14447, MPSC, March 9, 2005, at 11 (citation omitted)(emphasis in original).

47 In the matter of a General Investigation to Establish a Successor Standard Agreement, Docket No. 04-SWBT-763-GIT, Order Granting in Part and Denying in Part Formal Complaint and Motion for an Expedited Order, Kan. SSC, Mar. 10, 2005 at 6 ("…the Commission finds that it is the intent of the FCC in its TRRO to permit CLECs to consistently serve its customer base, which includes adding services, lines and servicing customers at new locations").

48 Arbitration of Non-Costing Issues, Docket No. 28821, Proposed Order on Clarification, Approved as Written, Tex. PUC, Mar. 9, 2005, at 1("…until a final disposition of this issue, SBC Texas shall have an obligation to provision new UNE-P lines to CLECs' embedded customer-base, including moves, changes and additions of UNE-P lines for such customer base at new physical locations").

49 Petition of Verizon California Inc., App. No. 04-03-014, Assigned Commissioner's Ruling, Cal. PUC Mar. 11, 2005 ("we conclude that 'new arrangements' refers to any new UNE-P arrangement, whether to provide service for new customers or to provide a new arrangement to existing services. The TRRO clearly bars both"), confirmed by the CPUC on March 17, 2005.

50 "We believe it is appropriate to adopt a longer, twelve-month, transition period than was proposed in the Interim Order and NPRM…the twelve-month period provides adequate time for both [CLECs] and [ILECs] to perform the tasks necessary to an orderly transition." TRRO ¶227.

profligately add or move services that can be transitioned away in 12 months, and no existing SBC customers will be eligible to purchase any add-on services restricted to the CLECs' embedded base (and thus will not be lured away from SBC by such services).

The remaining task is the identification of embedded customers, who will be able to move, add and drop ULS-related services during the transition. That should be accomplished through the processes, and on the schedule, already discussed above.

To the extent that SBC's ALs are inconsistent with the foregoing conclusions respecting the composition of the CLECs' embedded customer bases, they cannot be implemented or enforced. Moreover, as already concluded in this Order, SBC acted unreasonably in resolving the customers-versus-lines issue unilaterally, through its ALs.

B. DEDICATED TRANSPORT

In the TRRO, the FCC determined that CLECs are impaired without access to DS1 transport unless both ends of the pertinent route terminate at a Tier 1 wire center[51]. Thus, an ILEC must provide unbundled DS1 transport when either end terminates at a Tier 2 or Tier 3 wire center[52]. CLECs are impaired without access to DS3 or dark fiber transport when each end of a route terminates at a Tier 1 or Tier 2 wire center[53]. On routes without DS3 impairment (i.e., routes connecting Tier 2 wire centers), a CLEC is limited to obtaining 10 DS1 transport circuits from the ILEC[54]. Where there is DS3 impairment, the CLEC is limited to 12 DS3s per route[55].

Having established the foregoing quantitative criteria, the FCC instructed every CLEC to conduct a "reasonably diligent inquiry" and provide a self-certification that it is "entitled to the unbundled access to the particular network elements" it requests from an ILEC after March 11, 2005[56]. In turn, the ILEC "must immediately process the request" and "subsequently bring any dispute regarding access to that UNE before a state commission or other appropriate authority."[57]

The TRRO applies some of the same directives to dedicated transport that it applies to ULS/UNE-P. Among these are transition periods for phasing out unbundled dedicated transport where there is no impairment. The FCC prescribed a 12-month

[51] A Tier 1 wire center contains four or more fiber-based collocators or at least 38,000 business access lines. TRRO ¶112.
[52] A Tier 2 wire center contains three or more fiber-based collocators or at least 24,000 business access lines. *Id*. ¶118. A Tier 3 wire center is any wire center not in Tiers 1 or 2, and is considered by the FCC to include the lowest degree of competitive activity. *Id*. ¶123.
[53] *Id*. ¶¶129 & 133.
[54] *Id*. ¶128.
[55] *Id*. ¶131.
[56] *Id*. ¶234.
[57] *Id*. As noted, after the instant complaints were filed in Dockets 05-0154 and 05-0156, SBC issued an AL (CLECALL05-039 ("AL-39")) that purports to implement this provision.
the time

transition for DS1 and DS3 transport, and an 18-month transition for dark fiber transport[58]. As with ULS/UNE-P, those transitions are limited to the CLEC's embedded customer base[59]. Also, "[d]edicated transport facilities no longer subject to unbundling shall be subject to true-up to the applicable transition rate[60] upon the amendment of the relevant interconnection agreements, including any applicable change of law processes."[61]

Accordingly, insofar as the TRRO provisions governing, respectively, ULS/UNE-P and dedicated transport are identical, much of the analysis in this Order pertaining to the former also applies to the latter. There is a significant difference, however. The TRRO declares that there is no impairment associated with ULS/UNE-P anywhere and that, for that reason, no unbundling of either the network element or the platform is required anywhere (except during transition). In contrast to that across-the-board determination, non-impairment is the exception, not the rule, with regard to dedicated transport[62]. This is not only true in the TRRO's text, but in the actual circumstances of Illinois wire centers[63].

Consequently, implementation of the TRRO's transport provisions requires multiple stages: first, to determine whether impairment exists on a given route for circuits of the requested capacity (or for dark fiber); second, when there is no impairment, to determine whether the particular route serves the CLECs' embedded customer base (and therefore unbundled transport must be available to the CLEC during the applicable transition); third, when there is impairment, to determine whether the CLEC has reached the TRRO's numeric limits (10 DS1 circuits, 12 DS3s per route); and, fourth, to accommodate the TRRO's self-certification mechanism.

Moreover, since the self-certification mechanism, by its terms, applies only when a CLEC "submit[s] an order" for transport, it is not expressly applicable to unbundled transport already provided to the CLECs on or before March 11, 2005. Consequently, even though existing transport would presumably be eligible for transition, the CLECs and their affected customers will want to know whether an existing transport route is impaired, in order to make transition plans when necessary. The FCC expressly

[58] *Id.* ¶142.
[59] *Id.*
[60] The transition rates provide an increase over the price paid as of June 15, 2004 or over a subsequently approved price, whichever is greater. *Id.* ¶145.
[61] *Id.* ¶145, fn. 408.
[62] "The determination that in certain situations a CLEC is impaired without unbundled access to high capacity loops and transport is, therefore, different from the nationwide determination that CLECs are not impaired without unbundled access to UNE-P." Complaint of Indiana Bell Tel. Co., Cause No. 42749, Order, Indiana URC., April 6, 2005, at 2.
[63] "[T]here are, in fact, relatively few wire centers and routes that meet the FCC's non-impairment criteria for high capacity loops and transport. Of the over 278 wire centers in Illinois, SBC Illinois has determined that only 5 meet the non-impairment criteria for DS1 loops and 11 meet the criteria for DS3 loops. SBC Ill. Ex. 1.0 (Chapman) at 32 …The [TRRO] does *not* prevent carriers from obtaining high capacity loops and transport at all other wire centers and routes. SBC Init. Br. at 45 (emphasis in original).

contemplates this and, importantly, mandates negotiations to adopt a process to address changes in impairment status[64].

Therefore, this Order concludes that the FCC did not intend that its new unbundled transport rules would permit ILECs to deny requests for Section 251 transport before ICA revision is completed. The multi-stage analysis described in the preceding paragraphs presents too many disputable issues - and, indeed, the parties in fact already dispute SBC's identification of impaired wire centers, its definition of the embedded base and its self-certification scheme. Nothing in the TRRO indicates that SBC has been authorized to resolve these issues unilaterally. On the other hand, the implementation provision in paragraph 233 of the TRRO and the negotiation directive in footnote 399 demonstrate that the FCC expects bilateral implementation.

As this Order acknowledges regarding ULS/UNE-P, some quantum of non-embedded customers will obtain service through unbundled dedicated transport, without a Section 251 entitlement, while negotiations are completed. Again, however, this Order does not permit the CLECs to procure unauthorized transport (i.e., transport for non-embedded customers when impairment is absent, or transport in excess of numeric limits on circuits and routes where impairment exists). To be clear: every CLEC is prohibited from requesting dedicated Section 251 transport to serve, through non-impaired wire centers, any customer it believes to be non-embedded.

Moreover, the FCC provides two safeguards to protect SBC's interests as its Section 251 transport unbundling duty is phased out. First, the good-faith requirement in TRRO paragraph 234 is intended to constrain CLEC abuse of the self-certification process. Second, as with the other UNEs involved here, when CLECs erroneously use unbundled dedicated transport to temporarily serve customers, they will do so at the higher rates mandated by the TRRO (either initially or via true-up).

In sum, as of March 11, 2005, the complaining CLECS are prohibited from serving non-embedded customers through unbundled Section 251 transport unless there is impairment at the relevant wire centers, as defined by the TRRO. Additionally, the CLECs are prohibited from obtaining unbundled Section 251 transport in a quantity that exceeds TRRO limits. Any unbundled Section 251 dedicated transport provided to a CLEC after March 11, 2005 is subject to the rate increase established in the TRRO.

Also (insofar as they have not already done so), each complaining CLEC, and SBC, must immediately start negotiations to implement the multistage process described above for effectuating the new TRRO directives, and associated rules, concerning unbundled dedicated transport. Insofar as the TRRO (and the <u>01-0614 Remand Order</u>), trigger ICA change of law provisions in a manner that affects contract rights derived from 271 of the Federal Act or Section 13-801 of the PUA, negotiations

[64] "We recognize that some dedicated transport facilities not currently subject to the non-impairment thresholds established in this Order may meet these thresholds in the future. We expect [ILECs] and requesting carriers to *negotiate appropriate transition mechanisms for such facilities through the section 252 process*." TRRO ¶142 fn. 399 (emphasis added).

pertaining to unbundled dedicated transport under Section 271 (except negotiations with Cbeyond and Nuvox[65]) and under Section 13-801 (except negotiations with Talk, Nuvox and Global[66]) should also be conducted, consistent with the discussion of those statutes below.

Additionally, SBC must comply with the self-certification provisions of paragraph 234 of the TRRO (as it has stated it will do in AL-39), and is hereby prohibited from imposing on a CLEC any self-certification requirement that does not expressly appear in paragraph 234 or in an approved ICA with that CLEC. In the resolution of any dispute resulting from application of paragraph 234, the Commission will enforce - with respect to the composition of the CLEC's embedded customer base, the identification of non-impaired wire centers or the implementation of the TRRO's numeric thresholds for DS1 and DS3 transport where impairment exists - only those ICA provisions derived from bilateral (or, where permitted by the Commission, multilateral) negotiations and (where used) dispute resolution processes. Also, SBC is prohibited from: 1) denying new transport requests for service through impaired wire centers unless the TRRO numeric limits have been reached; 2) denying any new, add, drop, migrate or move request for dedicated transport service to a complaining CLEC's embedded customer; or 3) denying new, add, drop, migrate or move requests for a customer served through dedicated transport because of CLEC self-certification (unless the Commission orders otherwise). To be clear, the ruling made earlier in this order regarding ULS/UNE-P - that the embedded base consists of customers, not lines, elements, services or facilities - applies to transport as well. To the extent that SBC's ALs are inconsistent with these conclusions, they cannot be enforced.

C. HIGH CAPACITY LOOPS

The TRRO provides that CLECs are impaired without access to DS3-capacity loops in any building served by a wire center with fewer than 38,000 business lines and four fiber-based collocators[67]. Even with impairment, a CLEC may obtain only one DS3 loop per building from the ILEC[68]. An ILEC must provide unbundled DS1 loops for CLEC use in buildings served by wire centers with fewer than 60,000 business lines and four fiber-based collocators[69]. A CLEC is limited to ten DS1 loops per impaired building[70]. CLECs are never considered impaired without access to dark fiber loops[71].

As with dedicated transport, the FCC directed each CLEC to conduct a "reasonably diligent inquiry" and provide a self-certification that it is "entitled to the unbundled access to the particular network elements" (here, loops) it requests from an ILEC[72]. And again, the ILEC "must immediately process the request" and "subsequently

[65] These CLECs and SBC are free to negotiate Section 271 issues voluntarily, however.
[66] These CLECs and SBC are free to negotiate Section 13-801 issues voluntarily, however.
[67] TRRO ¶174.
[68] *Id.* ¶177.
[69] *Id.* ¶178.
[70] *Id.* ¶181.
[71] *Id.* ¶182.
[72] *Id.* ¶234.

bring any dispute regarding access to that UNE before a state commission or other appropriate authority."[73]

The TRRO also established transition requirements for loops. When non-impairment is present, the transition for DS1 and DS3 high capacity loops is 12 months, and there is an 18-month transition for dark fiber loops[74]. As with ULS/UNE-P, those transitions are limited to the CLEC's embedded customer base[75]. Additionally, "[h]igh capacity loops no longer subject to unbundling shall be subject to true-up to the applicable transition rate[[76]] upon the amendment of the relevant interconnection agreements, including any applicable change of law processes."[77]

Much of the analysis in this Order pertaining to transport and to ULS/UNE-P is equally applicable to loops. There are also important differences. As discussed above, the TRRO finds no impairment anywhere for ULS/UNE-P and, consequently, requires no unbundling of either the network element or the platform (except during transition). That is also the case with dark fiber loops (although with a longer transition). However, as with transport, non-impairment is the exception, not the rule, respecting DS1/DS3 loops - both in the conclusions of the TRRO and in the actual circumstances of Illinois wire centers[78].

Consequently, implementation of the TRRO's high capacity loop provisions requires multiple stages, as was the case with transport: first, to determine whether impairment exists for loops of the requested capacity; second, when there is no impairment, to determine whether the particular loop serves the CLECs' embedded customer base (and therefore must be available to the CLEC during the applicable transition); third, when there is impairment, to determine whether the CLEC has reached the TRRO's numeric limits (10 DS1 loops or one DS3 loop per building); and, fourth, to accommodate the TRRO's self-certification mechanism.

Again, since the self-certification mechanism, by its terms, applies only when a CLEC "submit[s] an order" for loops, it is not expressly applicable to unbundled transport already provided to the CLECs on or before March 11, 2005. Consequently, even though existing loops would presumably be eligible for transition, the CLECs and their affected customers will want to know whether an existing loop is impaired, in order to make transition plans when necessary. The FCC expressly contemplates this and,

[73] *Id.* Again, after the instant complaints were filed in Dockets 05-0154 and 05-0156, SBC issued AL-39, ostensibly to implement this provision.
the time
[74] *Id.* ¶195.
[75] *Id.*
[76] The transition rates provide an increase over the price paid as of June 15, 2004 or over a subsequently approved price, whichever is greater. *Id.* ¶198.
[77] *Id.* ¶198, fn. 524.
[78] SBC Init. Br. at 45 (see quotation in fn. 62, *supra*).

importantly, mandates negotiations to adopt a process to address changes in impairment status[79].

Therefore, as it does regarding transport, this Order concludes that the FCC did not intend that its new unbundled loop rules would permit ILECs to deny requests for Section 251 loops before ICA revision is completed. The multi-stage analysis described in the preceding paragraph presents too many disputable issues - and, indeed, the parties in fact already dispute SBC's identification of impaired wire centers, its definition of the embedded base and its self-certification scheme. Nothing in the TRRO indicates that SBC has been authorized to resolve these issues unilaterally. On the other hand, the implementation provision in paragraph 233 of the TRRO and the negotiation directive in footnote 519 demonstrate that the FCC expects bilateral implementation.

As with ULS/UNE-P and dedicated transport, some non-embedded customers will obtain service through unbundled loops, without a Section 251 entitlement, while negotiations are completed. To repeat, however, this Order does not permit the CLECs to procure unauthorized loops (i.e., loops for non-embedded customers when impairment is absent, or loops in excess of numeric limits at locations where impairment exists). Each CLEC is prohibited from requesting dedicated Section 251 high capacity loops to serve, through non-impaired wire centers, any customer it believes to be non-embedded.

Moreover, the FCC provides two safeguards, as it did with transport, to protect SBC's interests as its Section 251 loop unbundling obligations are phased out. First, the good-faith requirement in TRRO paragraph 234 is intended to constrain CLEC abuse of the self-certification process. Second, as with the other UNEs involved here, when CLECs erroneously use unbundled high capacity loops to temporarily serve customers, they will do so at the higher rates mandated by the TRRO (either initially or via true-up).

In sum, as of March 11, 2005, the complaining CLECS are prohibited from serving non-embedded customers through unbundled Section 251 high capacity loops unless there is impairment at the relevant wire centers, as defined by the TRRO. Additionally, the CLECs are prohibited from obtaining unbundled Section 251 loops in a quantity that exceeds TRRO limits. Any unbundled Section 251 loop provided to a CLEC after March 11, 2005 is subject to the rate increase established in the TRRO.

Also (insofar as they have not already done so), each complaining CLEC, and SBC, must immediately start negotiations to implement the multistage process described above for effectuating the new TRRO directives, and associated rules,

[79] "We recognize that some high capacity loops with respect to which we have found impairment may in the future meet our thresholds for non-impairment. For example, as competition grows, [CLECs] may construct new fiber-based collocations in a wire center that currently has 38,000 business lines but 3 or fewer collocations. In such cases, we expect [ILECs] and requesting carriers to *negotiate appropriate transition mechanisms for such facilities through the section 252 process*." TRRO ¶196, fn. 519 (emphasis added).

concerning unbundled high capacity loops. Insofar as the TRRO (and the 01-0614 Remand Order), trigger ICA change of law provisions in a manner that affects contract rights derived from 271 of the Federal Act or Section 13-801 of the PUA, negotiations pertaining to unbundled high capacity loops under Section 271 (except negotiations with Cbeyond and Nuvox[80]) and under Section 13-801 (except negotiations with Talk, Nuvox and Global[81]) should also be conducted, consistent with the discussion of those statutes below.

Additionally, SBC must comply with the self-certification provisions of paragraph 234 of the TRRO (as it has stated it will do in AL-39), and is prohibited from imposing on a CLEC any self-certification requirement that does not expressly appear in paragraph 234 or in an approved ICA with that CLEC. In the resolution of any dispute resulting from application of paragraph 234, the Commission will enforce - with respect to the composition of the CLEC's embedded customer base, the identification of non-impaired wire centers or the implementation of the TRRO's numeric thresholds for DS1 and DS3 loops where impairment exists - only those ICA provisions derived from bilateral (or, where permitted by the Commission, multilateral) negotiations and (where used) dispute resolution processes. Also, SBC is prohibited from: 1) denying new loop requests for service through impaired wire centers unless the TRRO numeric limits have been reached; 2) denying any new, add, drop, migrate or move request for service to a complaining CLEC's embedded customer; or 3) denying new, add, drop, migrate or move requests for a customer served through high capacity loops because of CLEC self-certification (unless the Commission orders otherwise). To be clear, the ruling made earlier in this order regarding ULS/UNE-P - that the embedded base consists of customers, not lines, elements, services or facilities - applies to high capacity loops as well. To the extent that SBC's ALs are inconsistent with these conclusions, they cannot be implemented or enforced.

D. UNBUNDLING UNDER SECTION 271 OF THE FEDERAL ACT

In the TRO, the FCC stated that "we continue to believe that the requirements of section 271(c)(2)(B) establish an independent obligation for BOCs[[82]] to provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under section 251."[83] This pronouncement was explicitly upheld on appellate review:

> The FCC reasonably concluded that checklist items four, five, six, and ten posed unbundling requirements for those elements independent of the unbundling requirements imposed by §§ 251-52. In other words, even in the absence of impairment, BOCs must unbundle local loops, local

[80] These CLECs and SBC are free to negotiate Section 271 issues voluntarily, however.
[81] These CLECs and SBC are free to negotiate Section 13-801 issues voluntarily, however.
[82] "BOCs" is the acronym for the former Bell Operating Companies, from which SBC is a merged entity.
[83] TRO ¶653.

> transport, local switching and call-related databases in order to enter the interLATA market[84].

It is therefore settled that Sections 271 and 251 of the Federal Act provide independent sources of authority for access to switching, loops and transport. As this Commission acknowledged in the recent XO-SBC Arbitration Order, "Section 271 of the Federal Act creates an unbundling obligation to which SBC must adhere, irrespective of its duties under Section 251 and the associated impairment analysis."[85]

Accordingly, since the TRRO only determines the impairment standard in Section 251, and does not address the scope of Section 271, ILEC duties and SBC rights under the latter statute remain unchanged by the TRRO. The question, then, is whether the complaining CLECs can assert rights derived from Section 271 in these proceedings.

SBC argues that Section 271 "makes clear that the FCC, and only the FCC, has authority under [S]ection 271 to enforce that provision."[86] It follows, in SBC's view, that once an ILEC's application to provide interLATA service has been approved by the FCC, Section 271 "provides authority only to the FCC to enforce continued BOC compliance with the conditions for approval."[87] SBC is right that the FCC has exclusive authority to enforce its order approving the ILEC's application. Only the FCC can impose the remedies set forth in subsection 271(d)(6) – i.e., a corrective order, a penalty or suspension or revocation of interLATA toll authority.

However, Staff maintains that the complaining CLECs are not seeking enforcement of the FCC's Section 271 Order for SBC, but enforcement of "the parties' respective ICAs."[88] Moreover, Staff asserts, the Commission "undoubtedly…does have the authority to resolve disputes brought to it regarding ICAs, and no party disputes this authority."[89] Staff is correct on these points. In addition to fulfillment of its Section 251 compliance duties, SBC entered into ICAs in order to advance its discretionary request for interLATA authority. This included demonstrating, first to this Commission, and then to the FCC, that SBC was supplying contractual access to loops, transport and switching, under subsections 271(c)(2)(B)(iv), (v) & (vi), distinguished from the access to these unbundled elements required by Section 251 (which is separately reinforced by subsection 271(c)(2)(B)(ii)). Therefore, in any ICA in which SBC committed to furnishing those unbundled elements under Section 271 (in addition to Section 251), it took on a contractual obligation that can be asserted to this Commission. That does not entail enforcement of the FCC's 271 Order for SBC, but of the ICA provisions this

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84 United States Telecom Association v. FCC, 359 F.3d 554, 588 (DC Cir. 2004)("USTA II")

85 XO Illinois, Inc., Petition for Arbitration of an Amendment to an Interconnection Agreement with Illinois Bell Telephone Company Pursuant to Section 252(b) of the Communications Act of 1934, as Amended, Docket 04-0371, Amendatory Arbitration Decision, Oct. 28, 2004, at 47.

86 SBC Init. Br. at 41.

87 *Id.*, at 41-42.

88 Staff Rep. Br. at 24.

89 *Id.* The Commission's authority is derived from both the Federal Act and the PUA, including Section 13-514(8).

Commission approved, which SBC *then used as evidence*, before the FCC, of fulfillment of the Section 271 checklist.

Which, if any, of the complaining CLECs has an ICA with SBC that contains an SBC obligation to provide loops, transport and switching under Section 271? Staff contends that McLeod, the XO complainants and one of the Joint CLECs (Global) have ICAs that incorporate Section 271 rights that can be asserted to the Commission[90]. Staff avers that the other Joint CLECs have not shown that they have ICA rights with SBC that are "afforded by Section 271."[91]

Staff is certainly correct with regard to Global and XO Illinois. Both the Global/SBC ICA and the XO Illinois/SBC ICA state that: "*[t]his agreement is the exclusive arrangement under which the Parties may purchase from each other the products and services described in Sections 251 and 271 of the [Federal] Act* and, except as agreed upon in writing, neither Party shall be required to provide the other Party a product or service described in Sections 251 and 271 of the Act that is not specifically provided herein."[92] This provision not only cites Section 271 as a source for the ICA's unbundling requirements, but also makes the ICA the sole mechanism by which Section 271 UNEs can be obtained. Thus, Global and XO Illinois each have a clear contractual right to 271 UNEs (unaffected by the TRRO), have surrendered their ability to assert 271 rights outside the ICA, and have, accordingly, an irrefutable enforcement right under the contract.

Regarding XO, however, SBC argues that the pertinent UNEs are "status quo elements" within the meaning of the parties' ICA, and that SBC's obligation to provide such elements "expired" under the terms of that contract.[93] This contention fails for two reasons. First, the "status quo elements" in the ICA are "UNEs impacted by USTA II"[94] – that is, Section 251 UNEs. Section 271 UNEs were not impacted by USTA II (indeed, as quoted earlier in this Order, USTA II expressly distinguished 251 and 271 elements). Second, SBC's unbundling duties regarding "status quo elements" did not expire where "otherwise required by Applicable Law."[95] The ICA defines "Applicable Law" as "all laws, statutes…orders...of any Governmental Authority that apply to the Parties or the subject matter of the Agreement or this Amendment."[96] Even without the express inclusion of Section 271 into the contract, as quoted in the preceding paragraph, Section 271 falls within this expansive definition of "Applicable Law." Consequently, whether or not the pertinent UNEs are status quo elements with the meaning of the contract, XO's Section 271 right to those elements did not expire.

[90] *Id.*, 23-28.
[91] *Id.*, 27.
[92] Joint Complainants Ex. 4.3, sec. 29.20; XO Ex. 2.5, sub-ex. F, Sec. 29.20 (emphasis added).
[93] SBC Pet. Rev. at 22.
[94] XO Ex. 2.5, sub-ex. K, sec. 1.3.
[95] *Id.*, sec. 1.3.3.
[96] *Id.*, sec. 2.2.

SBC asserts in its Petition for Review, for the first time in this proceeding, that Allegiance is not governed by the TRO Amendment to the XO ICA[97]. XO objects to this allegation as untimely, and also responds that Allegiance and SBC "have signed a name change amendment, and the Parties will terminate the Allegiance agreement soon."[98] The absence of an evidentiary record precludes a factual finding by the Commission (assuming this case is even an appropriate forum for making such a finding) respecting Allegiance's status as a merged entity or the viability of its pre-merger contracts. All the Commission can determine here is that if the XO TRO Amendment governs SBC's dealings with the Allegiance, then the conclusions of the preceding paragraph apply.

Moreover, even when viewed apart from the TRO-related amendments to XO's ICA, several provisions in the pertinent text in the Allegiance/SBC ICA would incorporate Section 271. First: "Unless otherwise provided by Applicable Law, this Agreement shall be governed by and construed in accordance with the [Federal] Act, the FCC Rules and Regulations interpreting the Act and other applicable federal law."[99] Second, in the UNE Appendix: SBC's "provision of UNEs identified in this Agreement is subject to the provision of the Federal Act, including *but not limited to*, Section 251(d)."[100]

Third, the UNE Appendix also states that SBC will provide CLECs, pursuant to both Section 251 and Section 271, with "nondiscriminatory access to UNEs…[o]nly to the extent that these elements are required by the 'necessary' and 'impair' standard of the [Federal] Act, Section 251(d) and/or in accordance with state law."[101] As discussed above, the necessary and impair standard is associated only with Section 251 UNEs (pursuant to subsection 251(d), as applied to subsection 251(c)(3)). But the foregoing ICA text also refers to the necessary and impair standard in the Federal Act *apart from* Section 251. Since there is none, the text can be construed to include Section 271 (based on the rationale that the contract would not impose a standard that cannot be met) or exclude it (based on the rationale that the contract intended exclusion where the impairment standard does not expressly apply). Because it refers to *both* the Federal Act and Section 251, the intention of the text is ambiguous. The Commission concludes, on balance, that the provision of 271 UNEs is contemplated by the quoted text, principally because SBC's nondiscrimination duty under subsection 271(d)(2)(B)(ii) is cited as a predicate for SBC's unbundling obligations. Since Section 251 has its own nondiscrimination requirement (in subsection 251(c)(3)), the parties' reference to

[97] SBC Pet. Rev. at 24.
[98] XO Resp. Pet. Rev. at 23.
[99] XO Ex. 2.5, sub-ex. E, sec. 22.1. SBC objects that this provision, and others cited, do not expressly mention Section 271. *E.g.*, SBC Pet. Rev. at 20. SBC could have refused to include, in its ICAs, references to entire comprehensive statutes or general bodies of law (*e.g.*, "applicable law"), in order to avoid application of specific provisions within those greater categories. However, contracting parties make pragmatic judgments about the risks and benefits of broad language and sometimes prefer the flexibility (along with the exposure) that such language affords. That was presumably the case here.
[100] McLeod Ex. 5, sec. 20.1, (emphasis added) opted into by Allegiance. XO Rep. Br. at 15.
[101] McLeod Ex. 5, sec. 2.2 & 2.2.9.

subsection 271(d)(2)(B)(ii) would be superfluous unless Section 271 unbundling duties were included within section 2.2 of the Appendix.

As noted, the foregoing quoted language also appears in the McLeod/SBC ICA. Therefore, McLeod's right to Section 271 UNEs is similarly grounded in, and can be enforced through, its ICA.

The Talk/SBC ICA contains language identical to the language in the Allegiance and McLeod ICAs, quoted above (that is, the "not limited to" provision[102], the exclusive source provision[103] and the nondiscriminatory provision of UNEs requirement[104]). All three appear in the ICA's UNE Appendix. However, there is also text in the ICA, under the heading "Unbundled Network Elements – Sections [sic] 251(c)(3)," that states: "[SBC] will provide CLEC access to [UNEs] for the provision of telecommunications services as required by sections 251 and 252 of the [Federal] Act and in the appendices hereto."[105] But that language does not exclude 271 UNEs and this Order construes the UNE Appendix, which is more specific to the provision of UNEs, to include 271 UNEs in the contract.

The Cbeyond/SBC ICA and Nuvox/SBC ICA do not demonstrate that either CLEC has a contractual right to Section 271 elements. Section 1.1.1 of the Cbeyond/SBC ICA's General Terms and Conditions says that the ICA's UNE provisions appear in Article 9 of the agreement. Article 9 is entitled "Access to Unbundled Network Elements – Section 251(c)(3)."[106] The Nuvox/SBC ICA also has an Article 9, entitled "Unbundled Access – Section 251(c)(3)." Nothing in either Cbeyond's or Nuvox's Article 9, including their general provisions, suggests that Cbeyond's or Nuvox's rights under Section 271 are incorporated into their respective ICAs.

This does not mean, of course, that Cbeyond and Nuvox lack UNE rights under Section 271. It means that such rights were not incorporated into those CLECs' ICAs, which the Commission has the authority to enforce. However, the CLECs retain statutory rights that are enforceable *outside* of the ICAs. But that enforcement must be sought exclusively from the FCC, under subsection 271(d)(6) of the Federal Act, in the form of redress for violating the FCC Order granting interLATA authority to SBC. (Alternatively, the CLECs can request negotiations to incorporate 271 rights in their ICAs.)

Therefore, SBC must continue providing Section 271 unbundled loops, transport and switching to XO, McLeod, Global and Talk (but not Cbeyond and Nuvox) under the terms of their respective ICAs, unless and until those ICAs are amended to terminate SBC's Section 271 obligations. Such Section 271 UNEs must be priced under "the just, reasonable, and nondiscriminatory rate standard of Sections 201 and 202 [of the

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[102] Joint CLEC Ex. 3.4, sec. 18.1.
[103] *Id.*, sec. 1.5
[104] *Id.*, sec. 2.2 & 2.2.9.
[105] Joint CLEC Ex. 3.3, sec. 46.7.11.1.
[106] Joint CLEC Ex's. 1.2 (Nuvox) & 2.2 (Cbeyond).

Federal Act],” as the FCC has mandated[107]. Since the parties’ ICAs all require Section 251 TELRIC pricing, they will need to be amended - to the extent SBC has been relieved of the Section 251 pricing obligation - to provide for Section 271 pricing (and, for that matter, Section 13-801 pricing)[108]. Until those amendments are approved, SBC should collect the TRRO-mandated transition rates for ULS/UNE-P and (where no impairment is present) for loops and transport. SBC does not have to provide combined UNEs under Section 271, but must continue to do so where Section 251 access is still required, where Section 13-801 allows CLECs to demand combinations, and where an ICA authorizes combinations.

E. STATE UNBUNDLING UNDER SECTION 13-801

Section 13-801 establishes state unbundling requirements for Illinois. That section permits, for any affected telecommunications carrier, unbundling obligations that are equivalent to the obligations under Section 251 of the Federal Act. However, for carriers subject to alternative regulation plans under the PUA - as SBC is - Section 13-801 allows “requirements or obligations…that exceed or are more stringent than those obligations imposed by Section 251…and regulations promulgated thereunder.”[109] Accordingly, this Commission determined in a 2002 Order that, for alternatively regulated carriers, Section 13-801 unbundling need not be predicated on Section 251-like finding of necessity and impairment[110]. Just weeks ago, on remand of that Order, the Commission confirmed its conclusion: “Among the specific differences between federal law and Section 13-801 is the absence of the federal ‘necessary and impair’ test as a precondition to access network elements.”[111]

Therefore, so long as the Commission’s Orders in Docket 01-0614 remain in effect, Illinois’ unbundling requirements under Section 13-801 are unaffected by the FCC’s findings in the TRRO concerning necessity and impairment. The Commission’s

[107] TRO ¶663.

[108] SBC has argued throughout this proceeding that the CLECs have no 271 rights in their ICAs because there are no 271 prices in those contracts. E.g., SBC Pet. Rev. at 23-24. However, there has been no reason for 271 pricing, since SBC was supplying UNEs under the ICAs at lower Section 251 TELRIC prices. The relevant issue has been whether a CLEC has preserved 271 *rights* in its ICA, in order to negotiate 271 prices after a change of law that ended 251 pricing.

[109] The full text of subsection 13-801(a) is as follows: “This Section provides additional State requirements contemplated by, but not inconsistent with, Section 261(c) of the federal Telecommunications Act of 1996, and not preempted by orders of the Federal Communications Commission. A telecommunications carrier not subject to regulation under an alternative regulation plan pursuant to Section 13-506.1 of this Act shall not be subject to the provisions of this Section, to the extent that this Section imposes requirements or obligations upon the telecommunications carrier that exceed or are more stringent than those obligations imposed by Section 251 of the federal Telecommunications Act of 1996 and regulations promulgated thereunder.”

[110] Illinois Bell Telephone Co., Filing to Implement Tariff Provisions Related to Section 13-801 of the Public Utilities Act, Docket 01-0614, Order, June 11, 2002.

[111] Illinois Bell Telephone Co., Filing to Implement Tariff Provisions Related to Section 13-801 of the Public Utilities Act, Docket 01-0614, Order on Remand (Phase I), April 20, 2005, at 62 (“01-0614 Remand Order”).

orders have not been overturned by the judiciary, and neither their contents nor the Commission's power to issue them has been preempted by the FCC or a court. SBC could seek a preemption declaration from the FCC, as did another ILEC in a proceeding relied upon by SBC[112], but it has yet to do so. SBC has requested preemption in an action filed in the United States District Court[113], but such relief was denied on an interim basis. To be sure, the federal court did preliminarily conclude that the "likelihood of success on the preemption question favors SBC." However, unless and until a formal and final ruling issues from that court, the pertinent Orders of this Commission are in force.

Additionally, the parties here apparently concur that the proper forum for resolving the question of preemption is the federal judiciary[114]. That is entirely consistent with the Commission's position that "it is not empowered to declare portions of Section 13-801 preempted or unconstitutional." [115] Thus, for the time being, the text of Section 13-801 that authorizes unbundling for alternatively regulated carriers without regard to the federal necessary impair standard, and this Commission's interpretation and application of that authority in Docket 01-0614, must be taken as they are.

The next step, then, is to identify the substantive content of the Commission's application of Section 13-801 authority to ULS. "SBC Illinois acknowledges that the Commission's June 11, 2002 Order in Docket 01-0614 interpreted Section 13-801(d)(4) to require SBC Illinois to provide CLECs with access to 'network element platforms' without regard to the whether the FCC has unbundled all of the network elements (including switching) that comprise the platform."[116] Indeed, SBC contends that the <u>01-0614 Remand Order</u> "expanded the scope of the June 2002 Order and reinterpreted 13-801 to require that SBC Illinois provide access to network elements without regard to the necessary and impair tests not only in the 'platform' context but also on a stand-alone basis and as part of combinations that do not constitute platforms."[117]

Although the present case concerns mass market switching, while the <u>01-0614 Remand Order</u> addressed switching for large-enterprise customers, the Commission declared that:

> The plain language of Section 13-801 makes it obvious that the General Assembly did not contemplate a distinction

[112] <u>In the Matter of BellSouth Telecommunications, Inc., Request for Declaratory Ruling</u>, WC Dckt. No. 03-251, WL 704118, rel. March 25, 2005.
[113] <u>Illinois Bell Telephone Co v. Hurley, et al.</u>, *supra*.
[114] *E.g.*, "These same [preemption] arguments are before the Northern District of Illinois, and that Court – not this Commission – is the appropriate forum in which those arguments should be considered," SBC Init. Br. at 37; "[t]here seems to be agreement that SBC's federal preemption argument regarding the state law requirements should be resolved in the federal court litigation, not in this case," McLeod Rep. Br. at 26.
[115] <u>01-0614 Remand Order</u> at 61. This limitation should be contrasted with the Commission's authority and duty to take into account, in its decision-making, a preemption finding by a superior sovereign.
[116] SBC Init. Br. at 31.
[117] SBC Rep. Br. at 25.

> between providing service to business customers and residential customers in regard to SBC's obligation to provide network elements. We note that the General Assembly was aware of the distinction between business customers and residential customers because it declared services to business customers as competitive in the same piece of legislation. However, in Section 13-801, it did not make any attempts to differentiate between services provided to business customers and services provided to residential customers. Because the legislature did not create such an explicit distinction, we are reluctant to engraft one onto the statute.[118]

The foregoing analysis, which is specific to ULS, reflects the Commission's more general conclusion that the absence of "limiting language" in Section 13-801 "impl[ies] that the General Assembly intended to grant *unrestricted access to network elements* from Alt-Reg companies."[119]

Nevertheless, SBC has insisted throughout this proceeding that our June 2002 Order did not extend the foregoing principles to stand-alone UNEs, including loops and transport. Therefore, SBC contends, until the 0614 Remand Order, the Commission's opinion was that the federal necessary and impair standard remained in the subsections of 13-801 governing such elements. Accordingly, SBC argues, its February 11 ALs, which preceded the 0614 Remand Order, were consistent with state law as it was applied when the ALs were issued. SBC misreads both Section 13-801 and our June 2002 Order. Once again, 13-801, by its terms, applies "additional State requirements," beyond the Federal Act, on alternatively regulated carriers. Subsection (d), by its terms, applies such requirements to *any* network element:

> The ILEC shall provide to any requesting telecommunications carrier, for the provision of an existing or a new telecommunications service, nondiscriminatory access to *network elements on any unbundled or bundled basis*, as requested, at any technically feasible point on just, reasonable, and nondiscriminatory rates, terms and conditions. [120]

Accordingly, in our June 2002 Order, we stated:

> Finally, to the extent that Ameritech has argued that Section 251(d)(2) of the federal act requires a state commission to engage in a necessary and impair analysis when dealing with *any issue concerning unbundling*, the Commission rests

[118] *Id.* 01-0614 Remand Order at 69.
[119] *Id.*, at 62 (emphasis added).
[120] 220 ILCS 5/13-801(d) (emphasis added).

> on its prior conclusion in the immediately preceding Section of this Order, that this argument is, in reality, an attack on the constitutionality of Section 13-801 and that the Commission is not the appropriate body to whom to make these arguments.[121]

Therefore, the February 2005 ALs were issued after the federal impairment standard had been unambiguously excluded from Section 13-801, with regard to all individual UNEs, as well as to the UNE platform[122].

It follows that SBC is required by Section 13-801 to provide ULS/UNE-P and unbundled loops and transport to the complaining CLECs, irrespective of the TRRO. Moreover, unlike the TRRO, state law does not limit the use of those UNEs to existing CLEC customers (that is, to the CLEC's "embedded base") and imposes no time limit on their availability (i.e., the termination of the TRRO-mandated transition period does not apply). Also, in the 01-0164 Remand Order, the Commission held that a CLEC, under Section 13-801, could exceed federal caps on the quantity of DS3 loops and transport obtainable from an ILEC, albeit at non-TELRIC prices.[123] Unless and until these principles are preempted, modified by the Commission, overturned by a court or altered by the state legislature, they must govern SBC's conduct now and must be reflected in the parties' ICAs[124] when those agreements are modified to incorporate the TRRO.

SBC contends, however, that none of the complaining CLECs have a present contractual right to obtain the relevant UNEs under state law. SBC's contention is based on its view that the CLECs' ICAs contemplate access to UNEs under federal law alone[125]. Staff apparently concurs, with respect to some of the CLECs[126].

Initially, it should be noted that even if SBC's argument prevailed on this point, its victory would likely be transitory. The 01-0614 Remand Order, which SBC perceives as an expansion of the unbundling power under Section 13-801, may well constitute a change of law under the parties' ICAs. As such, unbundling requirements under

[121] Illinois Bell Telephone Co., Filing to Implement Tariff Provisions Related to Section 13-801 of the Public Utilities Act, Docket 01-0614, Order, June 11, 2002 (emphasis added). The reference to constitutionality reflects the critical difference between Section 13-801 of the PUA and Section 251 of the Federal Act with regard to impairment. It thus frames the real issue (which the Commission is not empowered to resolve): whether Illinois law can survive that difference.

[122] SBC argues that the Commission undermined this position in the AT&T/SBC Arbitration. AT&T Communications of Illinois, Inc., et al., Verified Petition for Arbitration of Interconnection Rates, Terms and Conditions and Related Arrangements with Illinois Bell Telephone Company Pursuant to Section 252(b) of the Telecommunications Act of 1996, Docket 03-0239, Order (Aug. 26, 2003). SBC is wrong. In that proceeding, we said: "Section 13-801of the [PUA] makes quite clear that it imposes upon SBC additional requirements not inconsistent with [the Federal Act] and not preempted by FCC orders." *Id.*, at 41. Nothing in the ATT/SBC Arbitration incorporated the federal impairment standard into Section 13-801 for stand-alone UNEs (or any other elements).

[123] *Id.*, at 61.

[124] The incorporation of Section 13-801 in specific ICAs is addressed elsewhere in this Order.

[125] SBC Rep. Br. at 26.

[126] Staff Init. Br. at 29.

Section 13-801 would presumably be incorporated into the ICAs through the same processes that will reduce or excise the unbundling requirements of Section 251.

That said, SBC's characterization of the contents of the XO/SBC ICA is incorrect. The parties were directed to reflect 13-801 unbundling obligations in their amended contract[127]. Language subjecting SBC to the unbundling duties of "other Applicable Law" was thus included in the TRO Amendment approved by the Commission in Docket 04-0667. The "other applicable law" must be construed to include Section 13-801, because the parties were instructed via arbitration to incorporate that statute in their ICA.

The McLeod/SBC ICA also incorporates the UNE rights and obligations included in Illinois law. SBC has the duty to furnish non-discriminatory access to UNEs "[o]nly to the extent it has been determined that these elements are required by the 'necessary and impair' standards of the [Federal] Act, Section 251(d)(2) *and/or in accordance with state law* within the state this [ICA] is approved."[128]

Concerning Cbeyond, the parties' ICA provides that the UNEs identified in that agreement are not necessarily exclusive, that "CLEC may identify and request that SBC…furnish additional or revised [UNEs] required by applicable federal and/or state laws…[and] [f]ailure to list a network element herein shall not constitute a waiver by CLEC to request a network element identified by the FCC and/or by the Illinois Commerce Commission or Illinois General Assembly."[129] With specific regard to UNE-P, the ICA states that "[a]s required by Section 13-801(d)(4) of the [PUA] and all Illinois Commerce Commission rules and orders interpreting Section 13-801(d)(4), CLEC may use a network elements platform consisting solely of combined Network Elements of SBC…."[130] This language is sufficient to establish a contractual right to UNEs under Illinois law, enforceable by this Commission.

In contrast, the Nuvox ICA is devoid of language that can be fairly construed as incorporating Illinois law. In Section 29.3 of the ICA, the parties "acknowledge that the respective rights and obligations of each Party as set forth in this Agreement are based on the text of the [Federal] Act and the rules and regulations promulgated thereunder by the FCC and the Commission as of the Effective Date."[131] The ICA also states that "[e]ach Party agrees that this Agreement is satisfactory to them as an agreement under Sections 251 and 252 of the [Federal] Act."[132]

Talk's ICA also lacks language that would fairly support a finding that the agreement incorporates a CLEC's UNE rights under state law. Rather, the ICA states

[127] XO Illinois, Inc., Petition for Arbitration of an Amendment to an Interconnection Agreement with Illinois Bell Telephone Company Pursuant to Section 252(b) of the Communications Act of 1934, as Amended, Docket 04-0371, Amendatory Arbitration Decision, Oct. 28, 2004, at 49.
[128] McLeod Ex. 5, sec. 2.2.9 (emphasis added).
[129] Joint CLEC Ex. 2.2, Sec. 9.2.7.
[130] *Id*., Sec. 9.3.1.
[131] Joint CLEC Ex. 1.2, Sec. 29.3.
[132] *Id*., Sec. 29.1.

that "t]his Agreement is the arrangement under which the Parties may purchase from each other the products and services described in Section 251 of the Act and obtain approval of such arrangement under Section 252 of the Act."[133] The UNE Appendix to the ICA provides that SBC's "provision of UNEs identified in this Agreement is subject to the provisions of the Federal Act, including, but not limited to, Section 251(d)."[134]

Similarly, there is nothing in the in the Global ICA, in which the UNE provisions have been amended twice, that would fairly sustain the conclusion that the agreement invokes state law.

Therefore, irrespective of the impact of the TRRO on SBC's unbundling duties under Section 251 of the Federal Act, the independent, and presently viable, requirements of Illinois law remain effective wherever they are incorporated in an ICA. Thus, state unbundling requirements incorporated in the XO, McLeod and Cbeyond ICAs are properly enforceable in this proceeding.

As for pricing, since the Commission determined in the 01-0614 Remand Order that 13-801 UNEs should be provided and cost-based, but non-TELRIC rates, revisions will likely be necessary in the XO, McLeod and Cbeyond ICAs. Without suggesting a ruling on the issue here, it does appear that certain ICAs arguably contemplate immediate rate adjustments (as SBC contends with respect to Section 251-based revisions). In other instances, negotiation and (when needed) dispute resolution will have to occur[135]. A true-up will then be necessary, so that SBC can recover the difference between the TELRIC rates at which the relevant UNEs have been provided, and the non-TELRIC, cost-based rates associated with UNEs under Section 13-801.

It should be noted that SBC has "pledged that as long as that [UNE-P] access requirement remains in effect, SBC Illinois will not reject UNE-P orders to the extent the requesting CLEC has a right to purchase such a 'state law' UNE-P under its existing [ICA] or tariff."[136] Since that pledge is non-binding (and since it places Illinois law in dismissive quotation marks), its substance should be made mandatory and unequivocal. Again, the PUA and Commission orders plainly obligate the alternatively regulated SBC to provide ULS and UNE-P, whether through ICA or tariff.

F. SBC'S MERGER AGREEMENT

The complaining CLECs contend that the 1999 SBC/Ameritech Merger Order requires SBC to continue providing the UNEs at issue here. The pertinent provision, which appears in Appendix C of the SBC/Ameritech Merger Order, states:

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[133] Joint CLEC Ex. 3.3, Sec. 43.1.
[134] Joint CLEC Ex. 3.4, sec. 18.1.
[135] Such processes would be triggered by, for example, Section 2.11.3 of the McLeod/SBC ICA. McLeod Ex. 3.
[136] SBC Rep. Br. at 24.

> SBC/Ameritech shall continue to make available to telecommunications carriers, in the SBC/Ameritech Service Area within each of the SBC/Ameritech States, such UNEs or combinations of UNEs that were made available in the state under SBC's or Ameritech's local interconnection agreements as in effect on January 24, 1999, under the same terms and conditions that such UNEs or combinations of UNEs were made available on January 24, 1999, until the earlier of (i) the date the [FCC] issues a final order in its UNE remand proceeding in CC Docket No. 96-98 finding that the UNE or combination of UNEs is not required to be provided by SBC/Ameritech in the relevant geographic area, or (ii) the date of a final, non-appealable judicial decision providing that the UNE or combination of UNEs is not required to be provided by SBC/Ameritech in the relevant geographic area. This Paragraph shall become null and void and impose no further obligation on SBC/Ameritech after the effective date of a final and non-appealable [FCC] order in the UNE remand proceeding.[137]

In the body of the SBC/Ameritech Merger Order, the FCC explained the purpose of the foregoing directive:

> Offering of UNEs. In order to reduce uncertainty to competing carriers from litigation that may arise in response to the Commission's order in its UNE Remand proceeding, from now until the date on which the Commission's order in that proceeding, and any subsequent proceedings, become final and non-appealable, SBC and Ameritech will continue to make available to telecommunications carriers each UNE that was available under SBC's and Ameritech's interconnection agreements as of January 24, 1999, even after the expiration of existing interconnection agreements, unless the [FCC] removes an element from the list in the UNE Remand proceeding or a final and non-appealable judicial decision that determines that SBC/Ameritech is not required to provide the UNE in all or a portion of its operating territory.

[137] Application of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules, CC Docket 98-141, Memorandum Opinion and Order, FCC 99-279, 14 FCC Rcd 14712, App. C, ¶53. (1999).

SBC emphasizes that the Appendix provision contains the FCC's actual instructions, so that any conflict between the Appendix and the body of the SBC/Ameritech Merger Order should be resolved in favor of the Appendix. SBC Rep. Br. at 33. There is no conflict, however. The body of the SBC/Ameritech Merger Order provides the overarching rationale for the precise operative terms in the Appendix. The latter implements the former.

In any event, SBC's position is that the UNE access obligations imposed by the Appendix provision have been terminated by fulfillment of conditions in the text of that provision. The CLECs disagree, asserting that the "successor" to the UNE Remand proceeding – the TRO – remains appealable through the TRRO (which, in fact, is under appeal). The CLECs' characterization of the TRO as the UNE Remand successor undermines their argument. If the TRO *is* the UNE Remand proceeding, then a final FCC order ending certain unbundling obligations - the TRRO - has been issued in that proceeding, thus satisfying the "earlier" of the express conditions in the Appendix provision (i.e., condition (i)).

More importantly, however, the preceding analysis misses the forest for the trees. The six-year old SBC/Ameritech Merger Order was issued before the series of FCC and appellate decisions that determine the present context of UNE access. When it released the TRRO a few months ago, the FCC, which was inarguably familiar with its own merger order, rendered paragraph 53 of the Appendix obsolete. It would make little sense (even if this Order adopted the CLEC view of the SBC/Ameritech Merger Order's text, which it does not) to conclude that the FCC intended to simultaneously terminate (over 12 months) Section 251 ULS/UNE-P via the TRRO, yet also intended to preserve the SBC/Ameritech Merger Order obligation to provide ULS/UNE-P under a distant predecessor to the TRRO[138].

G. SPECIFIC 13-514 PROVISIONS

Various subsections of Section 13-514 identify certain actions as "per se impediments to the development of competition." Some or all of the complaining CLECs have asserted violations of subsections 13-514(1), (2), (4), (5), (6), (8) (10), (11) and (12). In this Order, SBC's ALs have contravened UNE rights for certain CLECs under Section 271 of the Federal Act and Section 13-801 of the PUA. The ALs also initially failed to implement the TRRO's self-certification procedures for unbundled loops and transport. Additionally, the ALs denied additional services and service modifications to the CLECs' embedded base customers, contravened TRRO true-up requirements and unilaterally identified impaired wire centers. The issue, then, is whether any of these SBC actions constitute some or all of the per se impediments in the subsections of Section 13-514, or constitute some other anticompetitive action within the meaning of that section.

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[138] As the Indiana Commission put it, the Merger Order (and other authorities cited) do not "supersede the significant weight of authority carried by the TRRO." Indiana Bell Tel. Co., Cause No. 42749, Order, Indiana URC., April 6, 2005, at 4.

As an preliminary matter, SBC asserts that, irrespective of the text of its ALs, it subsequently and promptly acted, as subsection 13-515(c) contemplates, "to correct the situation" about which the CLECs complained. Specifically, SBC emphasizes, it stated that it "would not reject UNE-P orders while the state law UNE-P requirements remain in effect."[139] However, even if it were assumed that SBC's purported correction contained a clear and binding promise to continue furnishing state law UNEs (and it did not), it still failed to address most of the CLECs' alleged violations. In its subsection 13-515(c) notice of alleged violation, each CLEC averred that SBC was contravening *federal law and the CLEC's ICA*, as well as state law[140]. In its response to the CLECs' notices, SBC stated only that it would not reject ULS/UNE-P requests premised on *state law* (and only until a federal court, in a pending action concerning that state law unbundling obligation, issued a ruling)[141]. SBC's silence about its alleged federal obligations and associated ICA violations is significant, since the TELRIC-based price of a Section 251 UNE is below the price of a state law UNE.

Moreover, SBC's ostensibly corrective statement did not address loops or transport, was not binding on SBC, was time-limited[142] and did not extend to any CLEC lacking a "right" to purchase state law UNEs under "its existing ICA or tariff." SBC has denied the existence of such right throughout this proceeding and in federal court, both in general[143] and for the specific CLECs here[144]. Accordingly, SBC's claimed corrective action does not prohibit this Commission from finding violations of the specific provisions of Section 13-514.

Also preliminarily, SBC stresses that it "has not turned away a single CLEC order" for the UNEs pertinent here[145]. Consequently, SBC concludes, it cannot be held in violation of Section 13-514. SBC misunderstands both the nature of the instant

[139] SBC Pet. Rev. at 12.
[140] Joint CLEC Complaint, Ex. A; XO Complaint, Ex's D & E; McLeod Complaint, Ex. E.
[141] SBC Response to Joint CLEC Complaint, Ex. 1; XO Motion for Emergency Relief, Ex. F; McLeod Complaint, Ex. F ("until the court issues a ruling, SBC does not intend to reject orders for [ULS] and UNE-P to the extent that the requesting CLEC has the right to purchase such 'state law' UNEs under its existing ICA or tariff"). SBC's purportedly corrective response to XO (in a March 7 "supplement" to its March 4 response) was not provided within the statutory 48-hour period.
[142] By its terms, SBC's forebearance would end when "the Court issues a ruling." This was not limited to a ruling favoring SBC – a point that SBC clarified (but also expanded to include rulings and actions by the FCC, the Commission and the Illinois Legislature) only for the Joint CLECs. SBC Resp. to Joint CLECs' Complaint, Ex. 2 (March 7, 2005 email).
[143] *E.g.*, "SBC Illinois *disagrees* with the Commission's June 11, 2002 Order in Docket 01-0614, on the grounds that (i) it is contrary to and preempted by federal law (a dispute…that is now before the federal district court) and (ii) contrary to the principles of statutory construction." SBC Pet. Rev. at 9 (emphasis in original). Similarly, until the issuance of the 0614 Remand Order, which occurred *after* SBC announced its purported correction, SBC contended that the federal necessary and impair standard applied to Section 13-801 loops and transport. *E.g.*, SBC Init. Br. at 35. Thus, insofar as the TRRO determined that loops and transport were unimpaired, CLECs would have no 13-801 right to those UNEs.
[144] *E.g.*, "[N]ot one of the CLECs has demonstrated that it has a contractual right to purchase non-impaired UNEs under state law." SBC Rep. Br. at 26. With regard to Talk, Global and Nuvox, this Order agrees with SBC on that point.
[145] SBC Pet. Rev. at 2-3.

complaints and the intention of the statute. The complaining CLECs do not assert that SBC rejected UNE requests, but that SBC *issued ALs* - declarations of the terms and conditions governing SBC's provision of UNEs – *that announced rejection of future requests* (i.e., requests made on or after March 11, 2005). Indeed, a principal purpose of the instant complaints was to avert such rejections before they occurred. Furthermore, after the ALs were issued, SBC confirmed, through letters to some of the complaining CLECs, that it would reject requests for the pertinent UNEs, starting March 11:

> **Please note that, notwithstanding your ICA(s), orders received for elements that have been declassified through a finding of non-impairment by the [TRRO] will not be accepted, beginning March 11, 2005, as clearly outlined in Accessible Letters CLECALL05-017 and CLECALL05-019.** The FCC's rules, effective March 11, 2005, provide that CLECs may not obtain such elements beginning on that date, and do not require contact amendments for effectuation.[146]

Section 13-514 states that a telecommunications carrier "shall not knowingly impede the development of competition," and identifies certain prohibited "actions" as per se competitive impediments. The subject ALs and confirmatory correspondence, quoted above, are actions within the meaning of the statute. Although SBC takes the astonishing position that its ALs are mere "words" and "beliefs those words express"[147] (just as the parties' ICAs, the orders of this Commission and the enactments of the Illinois Legislature and United States Congress are mere "words"), such words, when expressed and confirmed as official policies and procedures of the carrier[148], are legal actions. Section 13-514 provides protection against such legal actions, and does not require proof of *physical* impediment to competition.

SBC's argument more properly addresses whether its ALs have caused *damages*, not violations. In Section H, below, this Order takes due account of the fact that the Commission's March 9 emergency relief and SBC's forebearance have blocked rejection of CLEC UNE requests. In fact, the CLECs are denied monetary damages.

1. 13-514(1) ("unreasonably refusing or delaying interconnections or collocation or providing inferior connections to another telecommunications carrier")

The CLECs have employed "shotgun" pleading, alleging violation of each subsection of Section 13-514 for which a plausible argument could be offered. Such

[146] XO Complaint, Ex. C; McLeod Complaint, Ex. C; Joint CLEC Ex. 3.2 (bold in original).
[147] SBC Pet. Rev. at 10.
[148] The SBC/Cbeyond ICA identifies ALs as mechanisms by which SBC "communicates *official* information to [CLECs]." Joint CLEC Ex. 2.2, sec. 1.35.2 (emphasis added).

pleading is standard operating procedure in litigation (indeed, the failure to raise a colorable claim could subject legal counsel to complaint) and no criticism of that practice is intended in this Order. Nonetheless, there are disputes in which new statutory construction is inevitable (e.g., when there is no provision clearly applicable to the particulars of the case) and disputes in which certain provisions are plainly designed for the particulars of the case, rendering a construction of other statutory provisions superfluous. This proceeding presents the latter situation with respect to Subsection 13-514(1). There are other subsections of section 13-514 that squarely address the circumstances of this case. To decide, on the limited argument offered here, whether SBC's ALs constitute a refusal, delay or diminution of interconnection would be an unwise use of the Commission's authority. There is no need to create precedent (albeit nonbinding precedent) here, where the components and ramifications of such precedent have not been adequately briefed.

2. 13-514(2) ("unreasonably impairing the speed, quality or efficiency of services used by another telecommunications carrier")

SBC asserts that the pertinent UNEs here are not "services and that, for that reason, subsection 13-514(2) is inapplicable to this proceeding[149]. That assertion, even if true, would not preclude application of the subsection. The relevant question is whether a CLEC service has been impaired, not whether the ILEC behavior or instrumentality causing that impairment is a service. Put differently, an ILEC does not have to impair a service *with a service* in order to violate the subsection. Thus the essential principle articulated by the Commission, in the case on which SBC relies, was whether "the facilities eventually provided have otherwise adversely affected the services that [the CLEC] seeks to provide to end users."[150]

McLeod argues that if it needed to procure alternatives to the relevant UNEs, because of SBC's ALs, it would potentially face "costly and cumbersome workarounds, which could result in lower quality of service, and also use more costly, complex and time consuming processes (i.e., slower and less efficient) for placing orders and addressing maintenance issues."[151] McLeod further contends that "efficiency," within the meaning of the subsection, "carries an economic connotation," so that restriction on access to less costly UNEs constitutes an impairment of efficiency[152].

These arguments are persuasive. This case is about competition for revenue and profit. When inputs for the services the CLEC provides directly to the public are made slower, less attractive or more expensive to the CLEC, revenue is lost or profit shrinks. It would ill-serve the pro-competitive intentions of Section 13-514 - and, indeed, it would be unconstructively naïve - to construe speed, quality and efficiency apart from this competitive context. Accordingly, SBC impaired the speed, quality and

[149] SBC Init. Br. at 47.
[150] North Country Communications Corporation v. Verizon North, Inc., and Verizon South, Inc., Docket 02-0147, Order, Oct. 6, 2004, at 26.
[151] McLeod Rep. Br. at 41 (footnote omitted).
[152] *Id.*

efficiency of the UNEs it provided the CLECs, which in turn impaired the CLEC services utilizing ULS and unbundled loops and transport, by issuing ALs that disregarded unbundling duties under Section 271 of the Federal Act and Section 13-801 of the PUA; failed, initially, to implement the TRRO self-certification option; increased amounts billed rather than awaiting true-up; determined non-impaired wire centers without negotiation; and refused, without negotiation, to fulfill move, migration and add orders for embedded customers. Moreover, by acting unilaterally, when the TRRO explicitly mandated negotiation, and by ignoring substantive law provisions in Orders of the Commission and the FCC (as discussed in this Order), SBC was unreasonable within the meaning of this subsection.

3. 13-514(4) ("unreasonably delaying access in connecting another telecommunications carrier to the local exchange network whose products or services requires novel or specialized requirements")

The discussion concerning subsection 13-514(1) is applicable here as well. Moreover, there is virtually nothing in the record to establish that "novel or specialized requirements" are involved for any CLEC.

4. 13-514(5) ("unreasonably refusing or delaying access by any person to another telecommunications carrier")

Again, the discussion concerning subsection 13-514(1) is also applicable to this subsection. Furthermore, assuming that a telecommunications carrier has standing to assert a violation of this provision, which was taken for granted in North Country Communications, the Commission found it decisive in that docket that no refusal or delay of access to a particular person was proven. Despite the text of SBC's February 11 ALs, the CLECs offer no evidence of such denial or delay here, and SBC maintains that it has actually fulfilled the CLECs' orders for the pertinent UNEs (whether because of SBC's "pledges" or due to emergency relief awarded in this case).

5. 13-514(6) ("unreasonably acting or failing to act in a manner that has a substantial adverse effect on the ability of another telecommunications carrier to provide service to its customers")

Concerning whether SBC's ALs had a substantial adverse effect on the ability of the complaining CLECs to provide services to their customers, much of the above analysis for subsection 13-514(2) also applies here. The ALs purported to unilaterally, prematurely and (in some respects, as discussed in this Order) erroneously determine the availability of lower cost inputs for the CLECs' services. The substantiality of the cost differential between UNEs and other alternatives has driven unceasing federal and state litigation among carriers for many years. Although SBC mounts a defense on this issue, the bases for its denial of substantial adverse impact are contrived and manifestly unpersuasive. For example, SBC argues that the higher costs to CLECs were "precisely intended by the FCC when it did away with 251 UNEs" and that "the very conduct…authorized by the FCC" cannot be an "adverse" effect under state law[153]. But such cost increases can be adverse when they are imposed sooner than the FCC authorized, or on unilateral terms when the FCC required negotiations, as is the case here. They can also be adverse when imposed without regard for other governing law (Sections 271 and 13-801), as they were here.

Furthermore, adverse effect is not limited to direct financial impact. For instance, in addition to the effects on efficiency and service quality discussed in connection with subsection 13-514(2), McLeod maintains that abrupt, premature unavailability of SBC UNEs would likely cause McLeod to suspend some services, in lieu of paying for cost-prohibitive alternatives[154]. According to McLeod, this would compromise its reputation and good will with existing customers[155].

With regard to the reasonableness element in subsection (6), the results are mixed. As this Order finds above, it was not unreasonable for SBC to conclude that it could stop providing ULS/UNE-P before comprehensive amendment of its ICAs was completed. It was, though, unreasonable to issue ALs withholding UNE-P from embedded customers without first determining, through bilateral or multilateral processes, how such customers would be distinguished from new customers. It was also unreasonable to issue ALs that: disregarded unbundling duties under Section 271 of the Federal Act and Section 13-801 of the PUA; failed, initially, to implement the TRRO self-certification option for loops and transport and, thereafter, unilaterally expanded upon the terms of ¶234 of the TRRO; increased billed amounts rather than awaiting true-up; identified non-impaired wire centers for loops and transport without negotiation; and refused, without negotiation, to fulfill move, migration and add orders for embedded customers. Moreover, by acting unilaterally and prematurely, when the TRRO explicitly mandated bilateral negotiation before action (especially regarding loops and transport), and by ignoring substantive law provisions in Orders of the Commission and the FCC (as discussed in this Order), SBC was unreasonable within the meaning of this subsection.

6. 13-514(8) ("violating the terms of or unreasonably delaying implementation of an interconnection agreement entered into pursuant to Section 252 of the [Federal] Act…in a manner that unreasonably delays, increases the cost, or impedes the availability of telecommunications services to consumers")

This Order holds, above, that XO, McLeod, Global and Talk each have the right of access, under the terms of their respective ICAs, to UNEs under Section 271 of the Federal Act. Similarly, this Order finds, above, that XO, McLeod and Cbeyond have rights of access under the terms of their respective ICAs, to UNEs under Section 13-801 of the PUA. The ALs violated those terms by purporting to withhold the relevant UNEs generally, not merely pursuant to Section 251. Furthermore, to the extent that SBC

153 SBC Pet. Rev. at 41.
154 McLeod Ex. 1.0 at 10.
155 *Id.*

acted unilaterally and without negotiation through the ALs, in contravention of each CLEC's present ICA rights to the relevant UNEs under Section 251 of the Federal Act, as discussed throughout this Order, it has violated subsection 13-514(8).

Every breach of an ICA identified in the foregoing paragraph, if left unchecked by the emergency relief issued in these proceedings, or by SBC's nonbinding pledges, or by the requirements of this Order, was likely to delay, increase the cost, or impede the availability of, telecommunications services to consumers, for the reasons set forth in the analyses of subsections 13-514(2) and (6) above. Further, such adverse consequences were unreasonable, since SBC was aware of the contents of its own ICAs and lacked a reasonable basis for taking unilateral action, without negotiations, through the ALs.

7. 13-514(10) ("unreasonably failing to offer network elements that the Commission or the [FCC] has determined must be offered on an unbundled basis to another telecommunications carrier in a manner consistent with the Commission's or [FCC's] orders or rules requiring such offerings")

As this Order holds, above, the FCC has declared that CLECs have a right to certain UNEs under Section 271 of the Federal Act. The TRO makes this clear, and nothing in the TRRO changes those rights. XO, McLeod, Global and Talk have each incorporated such rights into their respective ICAs[156]. And, as already established in this Order, Section 13-801, as interpreted by the Commission, imposes unbundling obligations on SBC that are independent of SBC's unbundling duties under Section 251 of the Federal Act. The 2002 Order in Docket 01-0614 described those duties and the 01-0614 Remand Order confirmed (according to SBC, expanded) them. XO, McLeod and Cbeyond have negotiated the right to obtain Section 13-801 UNEs through their ICAs. It was unreasonable of SBC, in its ALs, to ignore those Commission and FCC requirements

Also, although this Order finds that SBC will be relieved of Section 251 ULS/UNE-P obligations after the brief negotiations described above, SBC retains Section 251 duties to embedded UNE-P, loop and transport customers, to customers served through loops and transport provided pursuant to CLEC self-certification, to loop and transport customers served through wire centers unilaterally deemed unimpaired by SBC, and to all customers subject to *post*-ICA amendment true-up under the TRRO. Those duties are determined by FCC orders or rules. SBC was aware of those orders and rules, and of the contents of its own ICAs, and lacked a reasonable basis for purporting to abandon those duties, without negotiations, through the ALs.

[156] SBC correctly points out that XO and McLeod did not assert violations of subsection 13-514(10) in their respective complaints. SBC Pet. Rev. at 44. However, that does not preclude the Commission from noting that SBC's conduct abridges the rights of those parties, as well as the rights of the relevant Joint CLECs, under the subsection. Since no monetary damages are awarded to any CLEC here, SBC will owe no compensation to XO or McLeod for violation of the subsection.

11. 13-514(11) (prohibits “violating the obligations of Section13-801”)

As already established in this Order, Section 13-801, as interpreted by the Commission, imposes unbundling obligations on SBC that are independent of SBC’s unbundling duties under Section 251 of the Federal Act. XO, McLeod and Cbeyond have negotiated the right to obtain Section 13-801 UNEs through their ICAs. To the extent that SBC’s ALs purport to deny such state law UNEs to those CLECs, they violate Section 13-801.

12. 13-514(12) (“violating an order of the Commission regarding matters between telecommunications carriers”)

For reasons articulated elsewhere in this Order, SBC’s ALs violate the 2002 Order in Docket 01-0614. Insofar as SBC has not withdrawn those ALs since the Commission issued the <u>01-0614 Remand Order</u>, SBC has violated the latter Order as well. The CLECs argue that SBC is also in violation of the Orders approving their respective ICAs with SBC. However, it is not clear that SBC’s actions violate those Orders, as contrasted with the terms of the ICAs themselves. Nor is it clear that exploring that distinction would be constructive in light of the other findings and conclusions in this Order. Consequently, for the reasons set out in connection with subsection 13-514(1), no decision will be made regarding violation of the Orders approving ICAs.

H. REMEDIES

All of the complaining CLECS request an Order containing each of the following forms of relief: 1) a declaration that SBC is in violation of the Federal Act, the PUA, the parties’ ICA provisions, and orders and rules of the FCC and the Commission; 2) a requirement that SBC cease the foregoing violations; and 3) recovery of CLEC costs and attorney’s fees in this proceeding. Joint CLECs also request that SBC be held responsible for damages, penalties and reimbursement of all of the Commission’s costs in conducting these dockets. SBC, in a counterclaim against XO and Joint CLECs, but not McLeod, also requests relief.

1. Declaration of Violation/Cease and Desist

Consistent with the analysis and conclusions above, this Order reaches certain conclusions regarding the lawfulness of SBC’s conduct and, as the consequence of those conclusions, requires cessation of completion of certain activities or policies.

First, SBC cannot lawfully deny a complaining CLEC’s Section 251 request for ULS/UNE-P, unbundled dedicated transport or unbundled high capacity loops that will be used to serve an embedded CLEC customer. This includes a prohibition against denying any CLEC new, add, drop, migrate, move or functionally similar request pertaining to for an embedded customer. Accordingly, to prevent or minimize such denials regarding ULS/UNE-P, SBC and each complaining CLEC shall, during a period not to exceed 28 days from the date on which this Order becomes final, negotiate and agree upon terms, conditions and processes by which embedded and new ULS/UNE-P customers will be distinguished[157]. Thereafter, SBC may deny any Section 251 request for ULS/UNE-P that will be used to serve a new customer[158].

Second, SBC cannot lawfully determine by any unilateral act or omission (including, but not limited to, its ALs) the terms, conditions or processes by which any complaining CLEC will obtain from SBC, under Section 251, unbundled dedicated transport, unbundled high capacity loops or ULS/UNE-P. This prohibition includes, but is not limited to, the identification of impaired or non-impaired wire centers, the implementation of the quantitative limits on loops and transport served through impaired wire centers, the self-certification process under ¶234 of the TRRO, and the implementation of true-ups required by the TRRO and this Order.

Third, SBC retains unbundling obligations for unbundled dedicated transport, unbundled high capacity loops and ULS/UNE-P under Section 271 of the Federal Act and Section 13-801 of the PUA (and Commission Orders implementing that statute). Where these obligations are incorporated into a complaining CLEC's ICA (as determined by this Order), SBC is prohibited from denying access to unbundled dedicated transport, unbundled high capacity loops and ULS/UNE-P.

Fourth, each party to this proceeding must immediately commence negotiations under Section 252 of the Federal Act (including all conditions precedent to commencing negotiations) to implement any requirements of the TRRO, other federal law, the Commission's 01-0614 Remand Order, and any other state law, that would constitute a change of law under the terms of its ICA with any other party here. Except as otherwise provided in this Order, no party here shall act or fail to act in contradiction of their present ICAs, until those ICAs are amended as required by this paragraph (after which each party must act in accordance with its amended ICA).

2. Attorney's Fees/Litigation Costs and the Commission's Costs

"[I]t is well established that fee-shifting statutes are to be strictly construed and that the amount of fees to be awarded lies within the Commission's 'broad discretionary

[157] During the 28-day period, CLECs will continue to pay the ULS/UNE-P prices in their ICAs as of March 11, 2005, which will be subject to true-up for embedded customers, per the TRRO, after the ICAs are amended. However, for any customer served after March 11, 2005 that is identified as a new customer under the terms negotiated during the 28-day period, the true-up must enable SBC to recover the difference between the rates a CLEC actually paid to procure ULS/UNE-P for such customer(s) and the lowest-priced alternative for which such customer(s) would have been eligible during the post-March 11 period.

[158] If SBC and any CLEC are unable to reach agreement in 28 days, the parties may resort to the dispute resolution processes in their ICA. The true-up requirements in the preceding footnote will apply, however, both to the 28-day period and the dispute resolution period.

powers.'"[159] Because the complaining CLECs have established that violations of Section 13-514 have occurred, they are entitled to an award of attorney's fees and costs under subsection 13-516(a)(3) of the PUA[160]. The question is how much. In Globalcom, Inc., v. Illinois Bell Telephone[161], the Commission tied the award of fees and costs under 13-516 to a party's litigation success. It did so to reflect the fact that Commission complaint proceedings often result, as does this one, in a "split decision" for the parties.

Here, each of the Complaining CLECs obtained emergency relief regarding loops and transport in this proceeding (but McLeod and Joint CLECs were denied such relief on ULS/UNE-P), then prevailed on several issues addressed in this Order. On the other hand, Joint CLECs and McLeod asserted the unsupportable claim that SBC must provide ULS/UNE-P until amendments to their respective ICAs are approved. Those parties also pursued an unsuccessful claim based on the SBC/Ameritech Merger Order. Additionally, certain Joint CLECs asserted rights under Section 271 of the Federal Act or Section 13-801 of the PUA that they had not incorporated into their ICAs.

Because XO did not present ULS/UNE-P claims, it prevailed on most of its claims. However, XO asserted unsuccessful claims under subsections of Section 13-514, claims for which it offered scant support, but which caused SBC to mount a defense. It would not be fair for SBC to subsidize those claims. XO is awarded recovery of 70% of its attorney's fees and costs.

Having achieved a more mixed success, McLeod will be awarded 50% of its fees and costs. McLeod does emphasize that it "asked SBC if it would apply the Emergency Relief Orders issued in Dockets 05-0154 and 05-0156 to McLeodUSA as well, but SBC refused…Because of SBC's refusal…it was necessary for McLeodUSA…to prepare and file its own Complaint and incur the costs of participating in this proceeding."[162] However, when McLeod requested relief from SBC, the emergency relief granted by the ALJ in the then-existing dockets included UNE-P. Since the Commission's Amendatory Orders subsequently deleted that portion of the emergency relief, SBC's refusal to satisfy McLeod's request was not, in hindsight, unreasonable.

Joint CLECs were not as successful as McLeod in this case, given their failed 271 and 13-801 claims regarding certain CLECs. On the other hand, unlike the other complaining CLECs, Joint CLECs did not press certain claims under subsections of 13-514 that had little likelihood of success and received little or no attention in the other CLECs' filings. Joint CLECs are awarded 40% of fees and costs. The Commission has no apparent authority to apportion such recovery among the Joint CLECs, so that matter is left to those parties.

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[159] Globalcom, Inc. v. Illinois Commerce Commission, 347 Ill.App.3d 592, 618 (1st Dist. 2004).
[160] 220 ILCS 5/13-516(a)(3) (the Commission "shall award" such fees and costs).
[161] Docket 02-0365, Order on Rehearing, Dec. 11, 2002. The Commission's treatment of fees and costs was upheld in Globalcom, Inc. v. Illinois Commerce Commission.
[162] McLeod Rep. Br. at 47.

All fees and costs presented to SBC by the Complaining CLECs should be reasonable and properly associated with this proceeding. In any dispute concerning such fees and costs, the CLEC shall bear the burden of demonstrating reasonableness and propriety. SBC shall pay the required portion of each CLEC's fees and costs within 60 days of the day on which this Order becomes final and unappealable, or within 60 days of receipt of a billing for such fees and cost from the CLEC, whichever is later.

Concerning the Commission's own costs, which it is obligated to recover under subsection 13-515(g)[163], the Commission, in Globalcom, Inc., v. Illinois Bell Telephone, linked such costs to the apportionment of attorney's fees and costs. Although that was a two-party proceeding, the CLECs here have, for the most part, presented identical claims, thereby creating two "sides" in this case. Therefore, SBC shall be assessed for its half of the Commission's costs, plus 53% (i.e., the average CLEC award here for attorney's fees and costs) of the CLEC's half.

All of the foregoing awards are "approximate quantifications" of the CLECs' litigation success in this proceeding, as the Commission stated in Globalcom, Inc., v. Illinois Bell Telephone. "Absolute precision regarding this quantification is simply not practicable."[164]

3. Damages and Penalties

SBC maintains that it "did not refuse to provision a single UNE-P circuit, or a single high capacity loop or dedicated transport circuit, based on the Accessible Letters complained of here. Indeed, CLECs do not even assert that they were denied access to any such UNEs."[165] SBC is correct that the CLECs have presented no basis for monetary damages. Despite the contents of SBC's ALs, the complaining CLECs have apparently not been denied access to the pertinent UNEs, even under Section 251, because of the combined effect of emergency relief and SBC's forbearance. Nor have they provided evidence of any damage directly or indirectly associated with the *potential* for denied access contained in the ALs.

As for penalties, subsection 13-516(a)(2) of the PUA provides, *inter alia*, that:

> for a second and any subsequent violation of Section 13-514 committed by a telecommunications carrier after the effective date of this amendatory Act…the Commission may impose penalties of up to $30,000 or 0.00825% of the telecommunications carrier's gross intrastate annual telecommunications revenue, whichever is greater…Each day of a continuing offense shall be treated as a separate

[163] 220 ILCS 5/13-515(g).
[164] Docket 02-0365, Order on Rehearing, Dec. 11, 2002, at 51.
[165] SBC Init. Br. at 55.

> violation for purposes of levying any penalty under this section.

83 Ill.Adm.Code 766.400 *et seq.* sets out specific procedures governing the imposition of penalties. Under subsection 13-516(b), the Commission may waive penalties "if it makes a written finding as to its reasons for waiving the penalty."

Joint CLECs are the only proponents of penalties here, and they have offered, at best, minimal support for their proposition. Consequently, the record is devoid of meaningful argument on this subject. The Commission is thus given little reason to expend the time and resources (its own and the parties') necessary to comply with the procedures detailed in 83 Ill.Adm.Code 766[166]. Penalties will be waived in this proceeding.

4. SBC's Relief

SBC requests that the complaining CLECs be required to execute a TRRO-related amendment prepared by SBC for inclusion in their respective ICAs. In effect, SBC proposes unilateralism with Commission approval. As discussed in this Order, the FCC, in the TRRO, expects bilateral negotiations to amend ICAs.

Alternatively, SBC asks the Commission to impose a time limit (i.e., until June 11 2005) on the parties' ICA amendment negotiations (after which, absent agreement, SBC would return to unilateral implementation of the TRRO). In paragraph 233 of the TRRO, the FCC directed the parties to proceed promptly and reminded them of their duty to negotiate in good faith. In addition, the FCC specifically encouraged state commissions to monitor this area closely and ensure that parties do not engage in unnecessary delay. Paragraph 233 clearly indicates that the FCC did not contemplate ILECs unilaterally dictating interconnection agreement amendments to the CLECs. Just as clearly, the Commission was afforded an important role in the process by which SBC and the complaining CLECs resolve their differences through timely and good faith negotiations.

Given the FCC's clear directive and the Commission's important monitoring role, the Commission imposes an additional time limit of no later than October 21, 2005 to negotiate and execute all applicable interconnection agreements and amendments between SBC and the complaining CLECs. Any extension beyond the October 21, 2005 deadline will require leave of the Commission. During this negotiation window, all parties are instructed to negotiate, in good faith, the interconnection agreement amendments to implement the FCC and ICC ordered changes. Pursuant to Section 13-515 and Section 10-101.1 of the Act, the Commission's ALJ for Dockets 05-0154, 05-0156, and 05-0174 is empowered to work with the parties to ensure that meaningful

[166] For example, Ameritech would have a right to a hearing, in order to address the "factors to be considered by the Commission" under Section 766.415 when assessing penalties, as well as a right to a written order under Section 766.410.

negotiations take place consistent with the FCC's directive to monitor the negotiation process and ensure that the parties do not engage in unnecessary delay. The ALJ may provide status reports to the Commission as necessary regarding the progress of these negotiations. The Commission may require the parties to show cause if they fail to meet the October 21, 2005 deadline.

V. FINDINGS AND ORDERING PARAGRAPHS

The Commission, having considered the entire record herein and being fully advised in the premises, is of the opinion and finds that:

(1) Joint Complainants, XO and McLeod are entities that own or control, for public use in Illinois, property or equipment for the provision of telecommunications services in Illinois and, as such, are telecommunications carriers within the meaning of §13-202 of the PUA

(2) SBC is an Illinois corporation that owns or controls, for public use in Illinois, property or equipment for the provision of telecommunications services in Illinois and, as such, is a telecommunications carrier within the meaning of §13-202 of the PUA;

(3) the Commission has jurisdiction of the parties hereto and the subject matter hereof;

(4) the recitals of fact and conclusions and conclusions of law reached in the prefatory portion of this Order are supported by the record and are hereby adopted as findings of fact and conclusions of law;

(5) the remedies described in Section IV.H of this Order should be adopted, and made mandatory, as specifically set forth above;

(6) the Amendatory Orders for Emergency Relief entered in each of these combined dockets should remain in effect;

(7) any objections, motions or petitions filed in this proceeding which remain undisposed of should be disposed of in a manner consistent with the ultimate conclusions herein contained.

IT IS THEREFORE ORDERED that pursuant to §13-514 of the PUA, the remedies described in Section IV.H of this Order are adopted, and made mandatory, as specifically set forth in this Order.

IT IS FURTHER ORDERED that the Amendatory Orders for Emergency Relief entered in each of these combined dockets shall remain in effect.

IT IS FURTHER ORDERED that any objections, motions or petitions not previously disposed of are hereby disposed of consistent with the findings of this Order.

IT IS FURTHER ORDERED that subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill. Adm. Code 200.880, and unless reviewed by the Commission under Section 13-515(d)(8) of the Public Utilities Act, this Order is final; it is not subject to the Administrative Review Law.

By Order of the Commission this 2nd day of June, 2005.

(SIGNED) EDWARD C. HURLEY

Chairman